

Ambush Marketing in the Context of the 2012 London Olympic Games

by

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ABSTRACT

Key words: Ambush Marketing, London Olympics, Proportionality, Trademark Law, Passing Off, Ethical, Good Business

Ambush Marketing occurs when a company affiliates itself with a major event without paying the requisite sponsorship fee. One of the aims of this thesis is to discuss whether the phenomenon can be deemed to unethical or good business practice. This will be done through exploration of current academic literature, consumer opinions and ethical ideologies.

With that in mind, the principle aim of this thesis is to discuss whether the London Olympic Games and Paralympic Games Act 2006 (London Act) is a proportionate response to the threat of ambush marketing. The London Act is ground breaking in its methods to protect the Olympics and its sponsors and possesses both stringent and unique measures that have never before been utilised to protect a major sporting event. The discussion of proportionality will be one that looks at whether the Act has struck the correct balance between all of the key stakeholders and will assess whether any elements of the Act are arguably disproportionate.

In addressing some of the criticisms that the Act has received, and keeping in line with the question of proportionality, trademark law and the common law remedy of passing off will be examined, in a bid to see whether the stringent measures in the London Act were warranted and whether trademark law and passing off are better suited to protecting the Olympics. The efficacy of trademark law and passing off will assist in coming to a conclusion to decipher whether the London Act was a proportionate response to the threat posed by ambush marketing.

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INTRODUCTION

When London was awarded the right to host the 2012 Olympic Games, in the midst of the celebrations, there would have been those whose immediate attentions would have turned to the specific legislation required and commencing the procedure to ensure its safe passage through parliament. The International Olympic Committee's (IOC) heavy-handed approach on ambush marketing would have meant that nothing but the most aggressive approach would be required in relation to the phenomenon.¹ In simple terms, ambush marketing is a type of marketing where a business organisation endeavours to create an association with a majorly sponsored event, without paying the requisite sponsorship fees that others would pay.² In doing so, the ambush marketers transgress various intellectual property rights associated with the event. There is much discussion pertaining ambush marketing. However, this research endeavours to address the legal aspects of the phenomenon.

When it comes to ambush marketing, there are three key stakeholders. The organisers, the official sponsors and the non-sponsors (these could be huge corporations, small individual businesses and the various advertising agencies). The organisers provide sponsorship opportunities and have contracts with the official sponsors, who in turn will demand effective protection from ambush marketing, relevant marketing space and authority to utilise Olympic intellectual property. The non-sponsors are the third parties whom seek to associate with the Olympics via ambush marketing through deceptive measures or smart marketing techniques.

The London Act's passage through the legislative houses attracted much criticism, mainly from the advertising industry.³ They argued that the Act was too restrictive and would have a detrimental impact upon society and business owners. Furthermore, they argued that the Act was harmful to the freedom of speech, citing traditional forms of intellectual property was sufficient enough to protect the Games.⁴ On the other hand, the organisers of the Games argued that such an Act was required to counter the dangers of ambush marketing, and

¹ Arul George Scaria, *Ambush Marketing: Game within a Game*, (Oxford University Press, New Delhi, 2008) pg 29

² T. Meenaghan, 'Point of view: Ambush Marketing: Immoral or imaginative practice?' (1994) JAR 77, 85

³ Mark James and Guy Osborn, London 2012 and the Impact of the UK's Olympic and Paralympic Legislation: Protecting Commerce or Preserving Culture?, (2011) 74(3) MLR 410, 423

⁴ S. Bhattacharjee & G. Rao, 'Tackling Ambush Marketing: The Need for Regulation and Analysing the Present Legislative and Contractual Efforts, (2006) 9(1) Sport in Society, pp133

pointed out that they possess a contractual right to protect the investments of the official sponsors.

The purpose of this research is to discuss whether the London Olympic Games and Paralympic Games Act is a proportionate response to the threat of ambush marketing. That said, this study proceeds on a considered presumption that the London Act is the best possible way of combating the menace of ambush marketing. The main objectives of this study are:

1. To survey the various ambush marketing practices today and analyse whether the phenomenon can be categorised as unethical or merely good business practice;
2. To critically analyse and examine the role that will be played by the London Olympic Games and Paralympic Games Act 2006 in protecting the forthcoming Games and to discuss whether the Act is a proportionate response to the threat posed by ambush marketing;
3. To assess some of the criticisms made in respect of the Act, primarily to examine the effectiveness of traditional legal measures in the context of ambush marketing and what role(s) they have to play in combating ambush marketing.

Chapter one will begin to address the research objectives by firstly outlining exactly what ambush marketing is. It is important to define the concept to see how real the threat of ambush marketing is to the Olympic Games. Furthermore, there are those academics that deem the phenomenon to be imaginative and ethical, especially where ingenious ambushes are successful.⁵ On the other hand, there are academics that deem the phenomenon to be unethical, and one that could have serious repercussions on the future staging of the Games.⁶ Ambush marketing will be explored from both perspectives in order to ascertain if any middle ground can be reached. In order to derive a conclusion, ethical ideologies will be utilised, alongside consumer reactions and academic views to determine whether the concept is unethical or good business practice. The overall purpose of this chapter will be to address the long standing debate on ambush marketing being unethical or good business practice. In terms of the objectives of the thesis, it will allow us to better understand whether sui generis legislation introduced for the 2012 Olympics is a proportionate or disproportionate response to the phenomenon.

⁵ J Schmitz, 'Ambush Marketing: The Off Field Competition at the Olympic Games' (2005) 3(2)Northwestern Journal of Technology and Intellectual Property, 208

⁶ D Cran and S Griffiths, 'Ambush Marketing: Unsporting behaviour or fair play?' (2010) 21(8) Ent. L.R, pp293

Chapter two discusses the London Act in relation to it being a proportionate response to the phenomenon. The notion of proportionality will be measured against that which would make the Act a disproportionate response. Here, a detailed consideration will be given to assess the competence of the Act in its potential to prevent ambush marketing. The relevant sections of the Act will be evaluated, and will look to scrutinise whether the legislators have gone a step too far in enacting this legislation. As such, the views of various academics will be considered along with issues of human rights, and the possibility of reversing the presumption of guilt for ambush marketing legislation. It is very much a question of whose rights should prevail in an ambush marketing situation where there is stringent legislation and ingenious marketing techniques utilised by the non-sponsors.

Chapter three will look at the traditional legal measure of trademark law. This will be an assessment of trademark law, to determine whether there is any substance to the arguments presented by the advertising agency, in that this traditional form of intellectual property can effectively protect against ambush marketing. The purpose is to see if any limitations can be highlighted, that may deem the measure as ineffective in the context of ambush marketing, potentially making the London Act a just and proportionate response.

Chapter four will analyse the law of passing off in relation to ambush marketing and will again assess the effectiveness of the remedy by exploiting some of its weaknesses in the context of ambush marketing.

The concluding chapter will recapitulate the findings of the research by summarising which measure is better suited to protecting against the phenomenon and discuss the potential for any further areas of research. The discussion will consider, in light of all the evidence, whether the London Act was a proportionate response to the threat of ambush marketing.

The objectives of the thesis will be carried out through analysis of exiting legal provisions and the rich academic literature on the topic.

CHAPTER ONE

This chapter will explore the concept of ambush marketing, its rationale and its conceptual development. The main purpose of the chapter is to analyse ambush marketing from two perspectives: Is it in some sense unethical and thus to be condemned on policy grounds? Or is it a creative and imaginative innovation to be welcomed? The discussion will contain some of the different definitions and methods of ambush marketing, arguments for and against use of ambush marketing, ambush marketing from the perspective of consumers, and ambush marketing from an ethical perspective. In essence, this chapter will look to build upon current research, but will look at the phenomenon from both perspectives in a bid to see if any middle or higher ground can be established between or beyond oppositions.

Ambush marketing is closely related to sponsorship. Before defining the term, it may be beneficial to examine the significance of sponsorship. Sport sponsorship represents one of the most significant marketing developments over recent decades. The origins of sport sponsorship may be found in the behaviour of Roman or Greek patronage, where wealthy Roman aristocrats would sponsor gladiatorial spectacles as a means of displaying their power and influence, and wealthy ancient Greek States would sponsor their winning athletes by providing new homes, money and tax free holidays.⁷ The ways in which sponsorship and in particular sport sponsorship are conducted today; it can still be classed as a very modern phenomenon.⁸

Sponsorship is a business relationship between a provider of funds, resources or services and an individual, event or organisation, which offers in return rights and association that may be used for a commercial advantage in return for the sponsorship investment.⁹ In essence, it is an agreement that aims to provide equitable and mutual benefits for both parties concerned. Sudzum opines that 'there is a great deal of synergy in sponsorship arrangements where all sides to the party can expect a real benefit after striking a commercially strong deal.'¹⁰ Furthermore, in terms of the benefits of sponsorship,

⁷ P. Kissoudi, 'Closing the Circle: Sponsorship and the Greek Olympic Games from Ancient Times to the Present Day' (2005) 22 International Journal of the History of Sport 618, 618.

⁸ T. Meenaghan, 'Point of view: Ambush Marketing: Immoral or imaginative practice?' (1994) JAR 77, 85

⁹ http://www.sponsorship.co.uk/in_sponsorship/in_sponsorship.htm accessed 26/09/2011

¹⁰ Mia Sudzum and Jason Rudkin-Binks, 'Legislative comment: The countdown begins', (2007) Ent. L.R. 253, 254

Meenaghan argues that sport sponsorship 'has the ability, perhaps not possessed by other methods of marketing communications, to reach major corporate publics in a single campaign.'¹¹ Meenaghan's view clearly explains the importance of sponsorship and the potential value it can bring to the sponsors.

What is ambush marketing?

Ambush marketing, can be described as a situation where another business organisation, often a competitor, intrudes upon public attention surrounding an event, thereby deflecting attention towards themselves and away from the sponsor.¹² This 'intrusion' that Meenaghan speaks of may cause consumer confusion over who the real sponsor actually is. It can also reduce the benefits the actual sponsor may have realised over the course of the event.¹³ More broadly, it is where a business organisation tries to affiliate itself with a major event without paying the requisite sponsorship fees. As a result, the ambush marketer gains a benefit by causing consumer confusion. The word 'Ambush', as used in the expression of ambush marketing, is synonymous to 'attacking, whilst lying in wait, with an element of surprise'.¹⁴ It is a chance for companies, who are not official sponsors, to induce the consumer to pay attention to their marketing, by utilising the interest surrounding an event. In other words, it is an attempt to align a brand with an event for which it has not secured any rights.¹⁵

From a theoretical angle, Scaria opines that,

'...ambush marketing refers to a business organisation's attempt to capitalise on the goodwill, reputation and popularity of an event, by creating an association with it, without the authorisation or consent of the necessary parties...'

It can then be argued that it is the attempt of one business organisation to attack and weaken an official sponsor's legal association with an event.¹⁶

In the narrow sense of the term, ambush marketing grants its user the key benefits of associating with a major event, whilst conserving a large proportion of the overall promotions

¹¹ *Ibid* at 2

¹² According to Meenaghan (1994) as in John Amis and T. Bettina Cornwell: '*Global Sport Sponsorship*', (2006) Berg Publishing, pp 207

¹³ T. Meenaghan, 'Point of view: Ambush Marketing: Immoral or imaginative practice?' (1994) JAR 77, 85

¹⁴ Oxford Online Dictionary <<http://oxforddictionaries.com/definition/ambush>> accessed 01 January 2011

¹⁵ Arul George Scaria, *Ambush Marketing: Game within a Game*, (Oxford University Press, New Delhi, 2008) pg 29

¹⁶ Arul George Scaria, *Ambush Marketing: Game within a Game*, (Oxford University Press, New Delhi, 2008) pg 16

budget needed to gain official rights.¹⁷ Therefore, it provides many of the benefits available to an official sponsor, in terms of fulfilling awareness and image objectives, but at a low cost.¹⁸ At its potential worst, it creates confusion for consumers which then denies the official sponsor the recognition due to them for their role. This ultimately denies the official sponsor the net benefit they could reasonably expect to receive from sponsoring the event in the first place.¹⁹

As ambush marketing is an attempt to freeload on the goodwill of the sporting event, from a legal perspective, ambush marketing can infringe various Intellectual Property laws including trademarks, copyrights and passing-off.²⁰ Furthermore, it can put a strain on the contractual relationship between the sponsor and the event. It should not be forgotten that sponsorship is a legally binding contract.²¹ In exchange for their funding, the sponsors will seek to impose an obligation on the sponsors that they guarantee a 'clean' event where ambush attempts are kept to an absolute minimum. Anti-ambush academics argue that once a 'clean' event cannot be guaranteed, sponsors would be less inclined to provide funding, which could lead to the demise of the event in question.²²

The IOC describe ambush marketing as,

‘...any attempt by an individual or entity to create an unauthorised or false association (whether or not commercial) with an event thereby interfering with the legitimate contractual rights of official marketing partners to the event...’²³

It is the choice of the IOC, who is the governing body of the Olympic Games, to decide who the sponsors of the Games are; anybody else, who attempts to claim a link to the Games, will be deemed as ambush marketers.

It is widely accepted that there are two types of ambush marketing.²⁴ Ambush marketing by intrusion can be described as the counterfeiter who is either operating outside the law or very

¹⁷ J Grady et al, ‘From Beijing 2008 to London 2012: Examining Event-Specific Olympic Legislation vis-a-vis the Rights and Interests of Stakeholders’ (2010) JOS 3(2) 144

¹⁸ T Meenaghan, ‘Point of view: Ambush Marketing: Immoral or Imaginative Practice?’ (1994 September/October) JAR, 78, 79

¹⁹ E Vassallo et al, ‘An International look at Ambush Marketing’ (2008) 95 TM Rep, 1339, 1344

²⁰ H Preuss et al, ‘Ambush Marketing in China: Counterbalancing Olympic Sponsorship Efforts’, (2008) 7 ABAM 7, 245

²¹ P Sheridan, ‘An Olympic Solution to Ambush Marketing: How the London Olympics show the way to more effective Trademark Law’, Sports Lawyers Journal 2010, 17(27) pg 2

²² T. Meenaghan, ‘Point of view: Ambush Marketing: Immoral or imaginative practice?’ (1994) JAR, 77, 85

²³ Phillip Johnson, *Ambush Marketing: A Practical Guide to Protecting the Brand of a Sporting Event*, (Sweet and Maxwell London, 2008), pg 7

²⁴ *Ibid*

close to its borders.²⁵ The second, and the focal point of this thesis, is ambush marketing by association where perhaps a legitimate organisation, who maybe a household name, conducts a marketing campaign to take advantage of an event. The former are those who are easily dealt with through the broad powers of trademark law and the London Olympic Games and Paralympic Games Act, by utilising the wide powers of seize and destroy the British Olympic Association (BOA) possess. It is the latter who are the ingenious ones. These tend to be established competitors of official sponsors.²⁶ For example, if Samsung were the successful candidate to sponsor the FIFA World Cup, Toshiba may use the practice of ambush marketing to create an impression among the audience that they too are associated with the event.²⁷

Some of the best examples of ambush marketing attacks have happened during world famous sporting events, such as Qantas Airways successfully ambushing the official sponsor Ansett Airways during the 2000 Sydney Olympic Games. Below, is a table that outlines some of the most popular and obvious methods of ambush marketing that have been seen at previous major sporting events and their impact.

Ambush Method	Benefits
Sponsoring Media Coverage	Leads to higher audience coverage than on-site event audience
Brand Sub-Category Sponsorship	Promotes affiliation with event through sponsorship of national team
Individual athlete sponsorship	Can cause major difference in sponsorship rights
Purchase of advertising in immediate vicinity of the event	Opportunity for non-sponsors to capitalise on various themes or activities of the event
Advertising and Promotion	Use of promotional activity through medium of advertising to attempt to create link

²⁵ K Toft, 'United Kingdom: Ambush Marketing and the London Olympics 2012' (2009) <<http://www.mondaq.com/article.asp?articleid=84874>> accessed 01 March 2010

²⁶ S Corbett & Y Van Roy, 'Events Management in New Zealand: one law to rule them all?', (2010) JOBL, 338

²⁷ S Bhattacharjee & G Rao, 'Tackling Ambush Marketing: The need for regulation and analysing the present legislative and contractual efforts' (2006) 9(1) SIS 129

Meenaghan's five potential ambush marketing tactics²⁸

Unsurprisingly, governing bodies have made an effort to control the aforementioned methods. The most effective method is to give the sponsors a first right of refusal over advertising, television rights, broadcasting etc.²⁹ For example, non-sponsors regularly advertised on billboards and through television broadcasting throughout the sporting event. Nike's ambush in 1996 saw them use all the billboards around the Olympic vicinity with athletes and the Nike 'swoosh'. This was done to the detriment of Adidas, who were the official sponsor.³⁰ A non-sponsor gaining such noticeable access in the current era of ambush marketing is unheard of.³¹ However, of late, ambush activities have become subtler. An association with the event is suggested via sponsorship, at the same time circumventing the legal implications.³² For example, it can now involve practices such as sponsoring the individual athletes that participate within the event, using photographs of the venue in a marketing and advertising campaign, giving away free tickets to the event as prizes in an advertising campaign, even giving away free merchandise (hats, t-shirts and small flags) bearing the ambush marketer's logo or name with the aim that people will carry it around the sports venue, and finally, purchasing television and radio time slots during the coverage of the event to promote their products.³³

Unfortunately, the legal remedies for these more "sophisticated" activities are less clear-cut or, in some instances, non-existent. This is of grave concern to both the organisers and official sponsors of such sporting events.³⁴ Cran and Griffiths argue that large-scale ambush campaigns of this kind forces the organisers to scrutinise the legislative protection, or lack of it, available to safeguard their events.³⁵ They state '...given the importance of commercial backing, it is fair to say the organizers have little option but to push for stronger

²⁸ T. Meenaghan, 'Ambush Marketing- A Threat to Corporate Sponsorship', (1996) SMR 103, 108

²⁹ B Seguin and NJ O'Reilly, 'The Olympic Brand, Ambush Marketing and Clutter' (2008) JOSMOM

³⁰ A Portlock and S Rose, 'Effects of Ambush Marketing: UK consumer brand recall and attitudes to official sponsors and non-sponsors associated with the FIFA World Cup 2006' (2009) IJSMS 273

³¹ J Reynolds, 'Let the Games Clamp Down', (12th January 2011) Source unknown, accessed at Lexis Nexis 11/03/11

³² M Sudzum and J Rudkin-Binks, 'Legislative comment: The countdown begins' (2007) Ent.L.R. 253

³³ P Botsford, 'Sports Law: World in Action' (2010), 23 Law Society Gazette

³⁴ *Ibid*

³⁵ D Cran & S Griffiths, 'Ambush Marketing: Unsporting behaviour or fair play?' Entertainment Law Review 2010, 293

protection...'³⁶ Therefore, ambush marketing aims to undermine the official sponsor. In doing so, it both diminishes the value of the sponsorship deal and has the potential to threaten the commercial viability of major sporting events.³⁷ This is because it is arguable that the prevalence of ambush marketing has made companies hesitant to provide sponsorship funding, or at least hesitant to provide as much sponsorship funding, as the benefits of being an official sponsor are often diluted by the actions of ambushers.³⁸ That said, it is fair to suggest that the rise of ambush marketing may, to an extent, rest with the event holders because of their greed and persistence in demanding even higher sponsorship fees.³⁹ Portlock and Rose opine that the organisers 'have failed to give the consumers adequate information and over commercialised the Olympics'.⁴⁰ As a result, people like Welsh⁴¹ believe that escalating prices and gaps left in the market by sponsors is the main reason for the rise in ambush marketing.

Clearly, the abovementioned discussion noticeably deems the concept as unethical. This is because one is intruding upon somebody else's marketing space. Furthermore, the phenomenon is often described by utilising terms such as 'unauthorised', 'thievery', and 'unfair'.⁴² However, on the other hand, McKelvey suggests that the term ambush marketing is one that is used loosely and often inappropriately.⁴³ The concept of ambush marketing in itself creates a number of ambiguities, and he raises questions such as: 'Is it still ambush marketing if a non-sponsor's activity is legal?' 'Is it still ambush marketing if the non-sponsor had no intention to cause confusion as to their association with the event?' 'Is it just ambush marketing because the event organisers and sponsors deem it to be?'⁴⁴ One can also question why such a phenomenon is not completely illegal? Such questions clearly show ambiguity with the concept and as such one must, at least in part, explore the phenomenon

³⁶ *ibid*

³⁷ K Toft, 'United Kingdom: Ambush Marketing and the London Olympics 2012' (2009) <<http://www.mondaq.com/article.asp?articleid=84874>> accessed 01 March 2010.

³⁸ M Sudzam, Legislative comment: the countdown begins, (2007) ELR.

³⁹ D Cran & S Griffiths, 'Ambush Marketing: Unsporting behaviour or fair play?' Entertainment Law Review 2010, 293.

⁴⁰ A Portlock and S Rose, 'Effects of Ambush Marketing: UK consumer brand recall and attitudes to official sponsors and non-sponsors associated with the FIFA World Cup 2006', International Journal of Sports Marketing and Sponsorship, (2009), 273.

⁴¹ J Welsh, Ambush Marketing: What it is, What it isn't (2002) 19 (summer) *Pool: Business and Marketing strategy*, <<http://www.poolonline.com/archive/issue19/iss19fea5.html>> accessed 26 January 2010.

⁴² D Doust, The Ethics of Ambush Marketing, Journal of Sport Marketing, (1998) <<http://fulltext.ausport.gov.au/fulltext/1997/cjism/v1n3/doust.htm>> accessed 20 July 2011.

⁴³ B Seguin and NJ O'Reilly, 'The Olympic Brand, Ambush Marketing and Clutter', Journal of Sport Management and Marketing, (2008) pg 67.

⁴⁴ S McKelvey & J Grady, 'Sponsorship Program Protection Strategies for Special Sport Events: Are Event Organisers Outmaneuvering Ambush Marketers', (2008) 22 JOSM 553.

through the eyes of ambush marketers. This is because all the arguments above, that attempt to deal with the criteria of ambush marketing, are all one sided. They centre on the phenomenon being unethical. If a higher or middle ground is to be established, it is imperative that ambush marketing is considered from both perspectives. Why do they partake in ambush marketing? Evidence suggests that firstly, official sponsorship may be too expensive. Secondly, the business organisation may be excluded from being a sponsor because of a sport organisation's restrictions on the number of sponsors in the same category of goods and services. Thirdly, the business organisation may be blocked from sponsoring because of pre-existing deals with a competing business organisation.⁴⁵

A differing perspective

The discussion above implies that ambush marketing is a phenomenon that has always had an 'unethical' aura about it. For example, it has always been synonymous to 'unauthorised intrusion'. Contrary to the evidence above, the term "ambush marketing" was first mentioned by the famous marketing strategist Jerry C. Welsh. He defined it as 'a name given to competitive assaults on ill-conceived and poorly implemented sponsorships.'⁴⁶ He argued that it was a marketing method that uses the same themes as the official sponsors to compete with them for marketing competition and pre-eminence. He stated that ambush marketing was just a moral label attached to a competitor, who was vying for consumer loyalty and recognition in the same thematic space.⁴⁷ He further criticised the 'weak minded view that competitors had a moral obligation to step back and allow an official sponsor to reap all the benefits from a special event'. He also argued and believed competitors had not only a right, but a moral obligation to shareholders to take advantage of such events and that 'all this talk about unethical ambushing is... intellectual rubbish and posturing by people who are sloppy marketers.'⁴⁸ This gives us quite the opposite definition of ambush marketing, when compared with the popular 'unauthorised intrusion' theory. Welsh clearly sought to glorify ambush marketing by capitalising on poor advertising campaigns by competitors. His theory clearly places ambush marketing into the 'innovative and good business' bracket. The

⁴⁵ *Ibid*

⁴⁶ O J Morgan, 'Ambush Marketing: New Zealand is in search of events to host' (2008) EIPR 454.

⁴⁷ Doust, The Ethics of Ambush Marketing, Journal of Sport Marketing, (1998)
<<http://fulltext.ausport.gov.au/fulltext/1997/cjism/v1n3/doust.htm>> accessed 20 July 2011.

⁴⁸ J Welsh, Ambush Marketing: What it is, What it isn't (2002) 19 (summer) *Pool: Business and Marketing strategy*, <<http://www.poolonline.com/archive/issue19/iss19fea5.html>> accessed 26 January 2010.

defiance of Welsh and his belief of ambush marketing being a moral label attached by poor marketers clearly gives the impression that from a business perspective, there may be nothing unethical about it. The early works of Meenhagan agreed with those who argued that the activity engaged in by non-sponsors is typically perceived and defended as ‘good business’ and a part of the normal ‘sharp cut and thrust’ of the business world.⁴⁹ The ‘you snooze, you lose’ perspective is one of the main arguments used by ambush marketers to justify their marketing strategies.⁵⁰ For example, Manager of Nike, Mark Pilkenton once justified an ambush by stating ‘... We feel like in any major sporting event, we have the right to come in and give our message as long as we don’t interfere with the official proceedings...’⁵¹ This suggests that Nike may view ambush marketing as good business rather than an unethical intrusion. They will seek to successfully ambush, if the opportunity arises, without any consequential illegalities.⁵² For example, the 1996 Olympics in Atlanta saw Nike buy all of the billboards around the Olympic stadium and erect a huge Nike centre within the vicinity of the stadium, which the spectators could visit. They were also given free Nike flags to wave in the Olympic stadium, in front of the world’s television cameras.⁵³

Further arguments posed by supporters of ambush marketing include the concept creating a positive and free market. Schmitz argues that by exposing the limits of official sponsorship, ‘ambushers can, in effect, help quantify the true market of sponsorship, by participating in a marketing bombardment, in a manner they deem most effective for them’.⁵⁴ It is also argued by Schmitz that if event organisers cannot guarantee an ambush-free event, then this fact should be taken into account when determining how much fee is paid to sponsor the Games.⁵⁵ Of course, critics of ambush marketing will argue that not enough sponsorship money can underestimate the financial viability of the Games.⁵⁶ However, it can also be argued that the Olympic Games’ finances can never be diminished by market imperfections such as ambush marketing because of the magnitude of coverage it attracts.⁵⁷ When viewed from the

⁴⁹ T Meenhagan, ‘Point of View: Ambush Marketing: Immoral or Imaginative Practice?’ (1994) 34(5) JAR 85

⁵⁰ L Pitt et al, ‘Event Sponsorship and Ambush Marketing: Lessons from the Beijing Olympics’, *Business Horizons* 53 (2010), 286.

⁵¹ S. Ironside, ‘Combatting Ambush Marketing’, (May 2007) *Mark. Mag.* 26-27.

⁵² D. Crow and J. Hoek, ‘Ambush Marketing: A Critical Review and Some Practical Advice’, (2003) *Art.1 Mark. Bulletin*, 1-14, p. 7.

⁵³ M Sudzam, Legislative comment: the countdown begins, (2007) *ELR*.

⁵⁴ J Schmitz, ‘Ambush Marketing: The Off Field Competition at the Olympic Games’ (2005) 3(2) *North Western JTIP* 208.

⁵⁵ *Ibid*

⁵⁶ T Meenhagan, ‘Ambush Marketing: A threat to Corporate Sponsorship’ (1996) 38 *SMR* 105

⁵⁷ K. Skildum-Reid, ‘Ambush marketing: Pros and cons of not being an official event sponsor’ (2007) *Prism Bus. Media* 37, 39.

perspective of the Olympic Games and the organisers, it is clear that this argument has some substance. How can an event, watched by billions, ever suffer the kind of financial difficulty that certain academics speak of?⁵⁸ However, when looking at this from the view of a sponsor, it can be argued that their finances can be diminished by market imperfections. For example, how would one feel if they have paid £40m in sponsorship funding for exclusive rights to find that a rival company has also gained coverage through ambush marketing? Furthermore, to then add insult to injury, post event research stipulates that the consumer could not correctly identify who the official sponsors were. Finances aside, from this perspective, it is arguable that ambush marketing is unethical. However, if the non-sponsor is merely exploiting a gap in the market, then fault should be attributed to the official sponsor for a poor marketing campaign. It is also clear that supporters of ambush marketing deem it to be a clever and fair game.⁵⁹ Blackshaw states that some ‘regard the tactic as a challenge to their creativity and ingenuity’ and think it is worth the effort, especially if they gain an advantage over their competitors.⁶⁰ In further support for non-sponsor activity, event organisers and sponsors typically denounce such acts as ambush marketing and unethical, without acknowledging the fact that they are not illegal.⁶¹ A possible reason why they tend to disclose such information is because admitting that such an act is not illegal may result in a different response from consumers, as it takes away the initial seriousness of the claim.⁶²

Further argument in favour of ambush marketing argues that there is nothing ethically wrong with the concept. For example, why should non-sponsors treat sponsorship in a manner that differs from their other competitive promotional techniques? In other words, why should they treat Olympic sponsors any different from how they treat all their other competitors?⁶³

The discussion above about the concept being unethical or good business practice has been widely debated and the answer to the question may, on one interpretation at least, rest within the eyes of the beholder.⁶⁴ It is difficult to find any middle ground in the debate as academic

⁵⁸ Doust, *The Ethics of Ambush Marketing*, (1998) JSM
<<http://fulltext.ausport.gov.au/fulltext/1997/cjism/v1n3/doust.htm>> accessed 20 July 2011.

⁵⁹ J Storch, *It’s An Ambush! Or Is It?*, (2010) 115(6) *Marketing magazine* 38.

⁶⁰ I Blackshaw, ‘Court Kick Off’ (2010) EL 13.

⁶¹ S McKelvey & J Grady, ‘Sponsorship Program Protection Strategies for Special Sport Events: Are Event Organisers Outmaneuvering Ambush Marketers’, *Journal of Sport Management*, 22, 2008, 554.

⁶² S Bhattacharjee & G Rao, ‘Tackling Ambush Marketing: The need for regulation and analysing the present legislative and contractual efforts’, *Sport in Society* 9(1), 2006 129.

⁶³ B Seguin and NJ O’Reilly, ‘The Olympic Brand, Ambush Marketing and Clutter’, *Journal of Sport Management and Marketing*, (2008) 67.

⁶⁴ S McKelvey & J Grady, ‘Sponsorship Program Protection Strategies for Special Sport Events: Are Event Organisers Outmaneuvering Ambush Marketers’, *Journal of Sport Management*, 22, (2008), 553.

views come from either end of the spectrum. It appears that one deems it as unethical, while the other views it simply as good business practice. For example, event holders will deem ANY activity by a non-sponsor as ambush marketing. On the other hand, a non-sponsor will claim to have a right to be there. Any activity by a non-sponsor will be categorised as innovative and smart business.⁶⁵ A potential middle argument could be to allow the sponsors to advertise as part of their contractual duty and should they be foolish enough to leave a gap in the market, then a non-sponsor should have the right to come in. In this scenario, the sponsor has the chance to ensure that they do not leave any gaps in the market. The sponsors get to move in the market first, with clear advantages in terms of rights to utilise Olympic intellectual property, and ensure that they leave no scraps for non-sponsors.

If there are some chinks in their armour, then and only then, should a non-sponsor exploit such gaps. The example of Nike's antics in 1996 can be attributed to this. They spotted a weakness in Reebok's advertising campaign and took full advantage.

At this stage, one can argue that ambush marketing by association can be categorised into a further two elements. 'Parasitic marketing', which seems to be a common pejorative term utilised to describe ambush marketing, which is deemed to be unethical.⁶⁶ Secondly, 'Parallel marketing', which is the conflicting term used for ambush marketing, which falls under Welsh's initial theory.⁶⁷ This obviously highlights ambush marketing as good business practice.⁶⁸ There has been an evolution of the meaning of ambush marketing from Welsh's initial definition to the present definition of the concept. The conceptual framework of ambush marketing seems to now reflect the balancing of a sponsor's contractual rights, against the rights of the non-sponsor to maintain a market presence. This balance is one of the biggest issues in ambush marketing, especially from a legal perspective.⁶⁹ How can ambush legislation strike the correct balance? Storch argues that some of the event specific legislation has been introduced 'to the extent of diminishing free speech and common sense'. Chapter two will look to discuss whether the London Olympic Games and Paralympic Games Act strikes the correct balance as per the conceptual framework. In the interest of balance, it

⁶⁵ T. Meenaghan, 'Point of view: Ambush Marketing: Immoral or imaginative practice?' (1994) *Journ. Advert. Research*, 77-88, 85.

⁶⁶ E Vassallo et al, 'An International look at Ambush Marketing', *Trademark Rep*, Vol 95 p1338.

⁶⁷ See page 7, at footnote 35. He describes it as 'a name given to competitive assaults on ill-conceived and poorly implemented sponsorships.

⁶⁸ J Glengarry, 'Rugby World Cup Legislation threatens our civil rights' *The New Zealand Herald*. <http://www.nzherald.co.nz/topic/story.cfm?c_id=247&objectid=10434725> accessed 01 January 2011

⁶⁹ S Corbett & Y Van Roy, 'Events Management in New Zealand: one law to rule them all?' *Journal of Business Law*, (2010), 339.

seems clear that the pendulum is swinging in favour of sponsors and event holders as specific anti-ambush legislation is being introduced everywhere and everytime a major sporting event is being held.⁷⁰

Consumer Views on the Phenomenon

One method that may be utilisable to help ascertain whether ambush marketing is unethical or good business practice is to explore the views of consumers, who the target audience of all marketing campaigns are, to see whether the phenomenon is perceived to be unethical. Pitt et al argue that ‘...ambush marketing would not work well - or indeed at all - if target audiences regarded it as unethical...’⁷¹ One immediate argument is that they generally do not care about ambush marketing as it has been around since 1984, which depicts that its novelty has worn off. There have been many ingenious methods of ambush marketing, along with constant pressure from the organisers for stricter legislation to be enacted. Should the target audience have rejected it as unethical, they would have negatively shunned the ambush marketer who had engaged in the stunt.⁷² However, Farrelly et al, in their survey were optimistic in claiming that ‘sponsors can rely on savvy and sophisticated audiences increasingly [being] indignant towards the deception that ambush marketers seek to propagate’.⁷³ Respondents in their survey demonstrated that ‘Consumers are far more astute and aware than in the past; less and less they will be deceived by ambush marketers’. This may simply be wishful thinking according to Pitt. He argues that numerous consumers feel ‘all is fair in advertising’.⁷⁴ Substance can be brought to his claim if Li Ning’s ambush at Beijing Games in 2008 is brought to attention.⁷⁵ For reasons mentioned above, consumers clearly thought it was all fair marketing. Their research demonstrated that 62.6% of consumers correctly identified Adidas as the official sponsor. A further 67.4% incorrectly thought the Li Ning was

⁷⁰ J Storch, It’s An Ambush! Or Is It?, *Marketing magazine* vol 115(6) (2010), 38.

⁷¹ L Pitt et al, ‘Event Sponsorship and Ambush Marketing: Lessons from the Beijing Olympics’, *Business Horizons* 53 (2010), 287.

⁷² H Preuss et al, ‘Ambush Marketing in China: Counterbalancing Olympic Sponsorship Efforts’, *Asian Business and Management* (2008) 7, 250.

⁷³ F Farrelly et al, ‘Defending the co-branding benefits of B2B partnerships: The case of Ambush Marketing’ *Journal of advertising research* (2005) 45(3).

⁷⁴ *Ibid* at 25

⁷⁵ Four billion people saw Li Ning, the founder and chairman of sportswear business organisation Li Ning, was the lighter of the Olympic Torch, when Adidas was the official Sponsor. This would be akin to the chairman or face of Reebok lighting the torch when a rival business organisation was the official sponsor.

also an official sponsor.⁷⁶ It was deemed to be the successful ambush of a local business organisation over an international giant. Cran and Griffiths also suggest that the public and even sections of the media react positively to ambush marketing. They state, ‘...many welcome the creative ambition...and no great lasting harm in ruffling the feathers of the organisers and the corporate giants...’⁷⁷ Here, again, there seems to be two conflicting distinct viewpoints from the issue in question. On the one hand there are the academics arguing that consumers are more akin to reject companies that undertake in ambush marketing. On the other, there are those who argue that consumers will see it as a fair practice to an open marketing world. However, the research surveys from both spectrums do not paint a clear picture as to whether they think it is immoral or imaginative.⁷⁸

Ethical Theory Perspective

Ambush marketing can also be evaluated from an ethical perspective. It is fair to argue that ethical behaviour of the parties is a necessity if a free market is to be maintained.⁷⁹ Two ethical theories could be applied to ambush marketing to see whether it can be deemed as an unethical practice. These are utilitarianism and duty-based ethics. These philosophical theories have been selected due to their conceptual framework concentrating on decision-making and consequences. It may be worthwhile to explore ambush marketing utilising these theories to ascertain how far we are from achieving that correct balance, and whether ambush marketing is unethical or good business. The aforementioned theories are diametrically opposed. Following on with the current theme of the chapter, it may be worthwhile to approach the discussion utilising opposing perspectives. Approaching the argument using opposed theories is more beneficial than looking at ambush marketing from a ‘flat surface’ perspective. This will ensure that there will be no single one-sided interpretation of the phenomenon. If it is possible to obtain the same conclusion utilising diametrically opposed theories, this may present a more definite answer to the question of ambush marketing being unethical or good business.

⁷⁶ L Pitt et al, ‘Event Sponsorship and Ambush Marketing: Lessons from the Beijing Olympics’, *Business Horizons* 53 (2010), 284.

⁷⁷ D Cran and S Griffiths, ‘Ambush Marketing: Unsporting behaviour or fair play?’ *Entertainment Law Review* (2010), 293.

⁷⁸ H Preuss et al, ‘Ambush Marketing in China: Counterbalancing Olympic Sponsorship Efforts’, *Asian Business and Management* (2008) 7, 256.

⁷⁹ P O’Sullivan & P Murphy, ‘Ambush Marketing: The Ethical Issues’, *Psychology and Marketing* 15(4) 358.

Generically, utilitarianism can be described as an ethical framework for moral action. It signifies that an act is morally right only if that act maximises the good. That is to say the total amount of good for all must be greater than the total amount of bad for all. The slogan for utilitarianism is ‘the greatest happiness for the greatest number’. It places emphasis on the consequences of an action.⁸⁰ John Stuart Mill, in his writings on Utilitarianism, stated:

‘...the creed which accepts as the foundation of morals, Utility, or the greatest happiness principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness...’⁸¹

He goes on further to state:

‘...the theory of life, on which this theory of morality is grounded – namely that pleasure and freedom from pain are the only things desirable as ends; and that all desirable things (which are as numerous in the Utilitarian as in any other scheme) are desirable either for the pleasure inherent in themselves, or as a means to the promotion of pleasure and the prevention of pain...’⁸²

From these explanations by Mill, the theory of maximisation of happiness and the reduction of pain can be applied to the ambush marketing process to deem whether the actions of these bodies are ethical or unethical. The clear limitation of the theory is that some pain can be caused in order to ensure maximum happiness. Mill goes on to argue ‘...the utilitarian morality does recognise in human beings the power of sacrificing their own greatest good for the good of the others. It only refuses to admit that the sacrifice is itself a good...’⁸³ This implies that a sacrifice that does not create happiness for the greatest number would be one that was wasted.

There are, however, limitations to this theory. Clearly the ‘greatest happiness for the greatest number’ will leave a minority unhappy.⁸⁴ Is this fair? Furthermore, motives and intentions of one’s decision making are clearly neglected in this consequentialist theory. It clearly dismisses the rightness and wrongness of an action by concentrating on the consequences.⁸⁵

⁸⁰ B Williams, ‘A Critique of Utilitarianism’ as in N Warburton, ‘Philosophy: Basic Readings’ 2nd ed, Routledge, (2005), 156.

⁸¹ J S Mill, Utilitarianism 1863 London, p11
<http://books.google.co.uk/books?id=lyUCAAAAQAAJ&printsec=frontcover&dq=utilitarianism&hl=en&ei=OIoITsatK8igOoTU-b4K&sa=X&oi=book_result&ct=result&resnum=1&ved=0CCsQ6AEwAA#v=onepage&q&f=false> accessed 19 July 2011.

⁸² *Ibid* at 57 pg 12

⁸³ *Ibid* at 57 pg 18

⁸⁴ P O’Sullivan and P Murphy, ‘Ambush Marketing: The Ethical Issues’, *Psychology and Marketing* 15(4) 358

⁸⁵ *Ibid*

From a utilitarian perspective, the consequences of decisions made by the event holders can be seen as perfectly ethical. They seek to benefit by offering sponsorships on a national and international level, the good being the sponsors can affiliate with the goodwill of the games. Simultaneously, they can utilise the sponsorship money to ensure that they can conduct a spectacular Games by creating the infrastructure, etc that can benefit a community, which benefits the consumers. Therefore Olympic sponsorship adheres to the ‘greatest good for the greatest number’ theory. A potential limitation being they cannot guarantee a clean event. Therefore, some ambush marketing may occur and the sponsors could be significantly harmed. However, this limitation could be akin to a sacrifice mentioned above. The organisers could campaign for such strict laws that would deem ambush marketing as illegal – so as to enhance the happiness of the sponsors. They could allow nobody apart from the sponsors to advertise, ban all spectators from wearing any branded clothing into the stadium and take legal action against those who contravene such conditions in a bid to stop ambush marketing. However, such an action cannot be deemed as utilitarian. This is because only the sponsors would benefit from such a stance and the country and consumers would suffer, as strict advertising laws would bind them. The strict restrictions on advertising would see consumers and advertisers look at the Games in a negative manner. Therefore, they would not be adhering to the utility theory. In doing so, they would be happy to sacrifice and would rather see an ambush, rather than place unreasonable restrictions on the ‘greatest number’, which would be the consumers and an audience of four billion. Furthermore, such strict advertising and enforcement of laws would not be of any benefit to the sporting world.⁸⁶

From an ambush marketer’s perspective, the consequences from their decision-making are unethical as their marketing campaigns are designed to benefit themselves and not ‘the greatest number.’ For example, a successful ambush will, so to speak, bring ‘pain’ upon the sponsors, the event organiser and those whom generally view ambush marketing in a negative manner. They are engaging in behaviour that is harmful to the greater good of sport.⁸⁷ Furthermore, an ambush can affect the goodwill associated with the game. What is clear from this theory is that ambush marketers rarely care what the impact of the ambush would be on the parties mentioned above. Ambush marketing, therefore, from a utilitarian perspective is both immoral and unethical. Possible limitations with this interpretation is if the non-

⁸⁶ Doust, The Ethics of Ambush Marketing, Journal of Sport Marketing, 1998, <http://fulltext.ausport.gov.au/fulltext/1997/cjism/v1n3/doust.htm>> accessed 20 July 2011

⁸⁷ C Hart et al, ‘Rules of the Game: Ethics in Sport Marketing’, <<http://www.sports-media.org/newpedimension7.htm>> accessed 20 July 2011

sponsor's consequence is to provide cheaper goods for the consumers and spectators, then it may be argued that ambush marketing would be ethical from a utility perspective; as the consequences of their actions are to primarily, enhance revenue. Simultaneously, they are providing cheaper goods for the consumers who are, after all, the greatest number. However, the primary aim of ambush marketing is to create confusion for self-interest and increase revenue.⁸⁸ This clearly goes against the principles of utility as the consequence of confusion has no credibility, and would definitely not benefit the 'greatest number'. Thus, ambush marketing would be deemed as unethical and poor business practice under this theory.⁸⁹

Ambush marketing can also be assessed to see whether it is unethical or good business practice by discussing it in relation to duty-based ethics. Duty-based ethics is fundamentally different from utilitarianism.⁹⁰ Duty based ethics imply that all human beings have 'rights'. It draws upon the works of Immanuel Kant. Kant believed in the fundamental worth of human beings and '...each person was endowed with moral integrity and the capacity to reason and conduct their affairs rationally...'⁹¹ His theory compels subjects to look and evaluate, from an objective point of view, social goals as well as personal desires and welfare when considering behaviour. In essence, the key to this theory is to treat everybody with dignity and have the right to expect such treatment from others.⁹² More importantly, deontological ethics, unlike utilitarianism, is concerned with what people do, not with the consequences of their actions. Being a non-consequentialist theory, one cannot justify an action by proving that it produced good consequences. If deontologists are compared with consequentialists, it can be seen that consequentialists will determine which actions are 'good' and then identify the 'right' actions based upon how much happiness such actions will bring. Deontologists, on the other hand, will look at which actions are 'right' before identifying the 'good' actions. The theory being a person does more good if they are doing a morally right action in the first place. However, there are limitations for this theory. For example, because deontological ethics is not interested in the consequences, this could lead to actions reducing overall happiness.

⁸⁸ D Doust, The Ethics of Ambush Marketing, Journal of Sport Marketing, 1998, <<http://fulltext.ausport.gov.au/fulltext/1997/cjism/v1n3/doust.htm>> accessed 20 July 2011

⁸⁹ *Ibid*

⁹⁰ F B Cross & R L Miller, 'West's legal environment of business: Text and Cases, Ethical, Regulatory, International and E-commerce issues, Thomson 2007, 95

⁹¹ D Carper et al, *Understanding the Law* 5th edition, (Thomson 2008), USA, pg 30 <http://books.google.com/books?id=kLzxLTzpEHUC&pg=PA30&dq=duty+based+ethics&hl=en&ei=UQImTp2aCoON-wankIztCw&sa=X&oi=book_result&ct=book-thumbnail&resnum=2&sqi=2&ved=0CDAQ6wEwAQ#v=onepage&q=duty%20based%20ethics&f=false> accessed 19 July 2008

⁹² *Ibid*

A key factor in determining whether a business decision is ethical or not is based on how the decision affects others. Furthermore, is the decision to ambush a morally 'right' one? Rather than concentrating on the consequences of a decision, this ethical theory concentrates on the moral intentions of the decision maker and this can be utilised to see whether ambush marketing is unethical or good business practice.⁹³ Furthermore, as it is a non-consequential theory, one will only know if the decision to ambush was good business practice if the ambush was successful.⁹⁴ Therefore, one can argue that it is a simple question of whether it is ethical or unethical. By taking into account the evolved pejorative meaning of ambush marketing by Scaria who stated that,

‘...ambush marketing refers to a business organisation’s attempt to capitalise on the goodwill, reputation and popularity of an event, by creating an association with it, without the authorisation or consent of the necessary parties...’⁹⁵

It is clear that the above seems to be an intentional operation by the non-sponsor to act deceitfully, in a bid to create a false association with the Games. If this standard is applied, then ambush marketing is definitely an unethical practice. Clearly, the decision to ambush is not 'right' and is morally incorrect; hence if the intentions of the decision maker is to free ride and deceive, surely that is also unethical. It will not matter how imaginative the marketing campaign is. Similarly, it need not matter whether the act is deemed as good business practice.

Additionally, the theory compels subjects to treat others as they expect themselves to be treated. In this respect, if the ambush marketer were to switch places with the sponsor, how would they react to the possibility of being ambushed after paying such a substantial amount of money?⁹⁶

Meenaghan offers another interpretation of duty-based ethics, which is more in line with current ambush techniques and in line with Welsh’s initial definition of ambush marketing. Meenaghan⁹⁷ and Welsh have argued that an ambusher may have a moral duty to ambush

⁹³ P O’Sullivan & P Murphy, ‘Ambush Marketing: The Ethical Issues’, *Psychology and Marketing* (1999)15(4) 360

⁹⁴ BBC ethics accessed at <http://www.bbc.co.uk/ethics/introduction/duty_1.shtml> accessed 19 July 2011

⁹⁵ Arul George Scaria, *Ambush Marketing: Game within a Game*, (Oxford University Press, New Delhi, 2008) pg 16

⁹⁶ D Doust, *The Ethics of Ambush Marketing*, *Journal of Sport Marketing*, 1998, accessed at <<http://fulltext.ausport.gov.au/fulltext/1997/cjism/v1n3/doust.htm>> accessed 20 July 2011

⁹⁷ T. Meenaghan, ‘Ambush Marketing- A Threat to Corporate Sponsorship’, (1996) *Sloan Manage. Review* 103-113, p. 108

market.⁹⁸ They would look to gain a competitive advantage via ambush marketing so that shareholder returns may be maximised. Consequently, without the ambush, they are denied the right to participate in a marketing campaign due to not being able to afford sponsorship.⁹⁹ The success that Nike has had from ambush marketing can be attributed to this technique.¹⁰⁰ The limitation of deontological ethics mentioned above could apply in this instance. If non-sponsors believe that the duty to make the shareholders happy is a 'good' act, then they will not consider the consequences of ambush marketing in any event. However, one could argue that such a duty may exist to shareholders, but any marketing campaign that seeks to create an association to the event by way of sponsorship cannot be justified as ethical. This is because it is done so with the intention to mislead, and that in itself is both immoral and unethical.

Having utilised two diametrically opposed theories that have provided similar outcomes, it is arguable that ambush marketing from an ethical theory perspective is both immoral and unethical. There clearly would be no middle ground in this respect, especially as both theories have provided negative outcomes on the phenomenon. This definitely assists in answering the ethical/good business debate as the previous discussions above have failed to provide a satisfying outcome.

Conclusion

To conclude, it is evident that the term ambush marketing is very ambiguous. This is a key element that readers ought to have learnt from this debate. The theory can be interpreted in many ways, from many angles. Furthermore, whichever angle it is interpreted from, in respect of it being unethical or good business practice, there is a more than likely chance that readers would be presented with arguments that are inconclusive for various reasons. For example, ambush marketing on the one hand it is an 'unauthorised intrusion' capitalising on the goodwill of the Games, while on the other hand, as Portlock and Rose propose,

⁹⁸ J Welsh, Ambush Marketing: What it is, What it isn't (2002) 19 (summer) *Pool: Business and Marketing strategy*, <<http://www.poolonline.com/archive/issue19/iss19fea5.html>> accessed 26 January 2010

⁹⁹ D Doust, The Ethics of Ambush Marketing, *Journal of Sport Marketing*, 1998, accessed at <<http://fulltext.ausport.gov.au/fulltext/1997/cjism/v1n3/doust.htm>> accessed 20 July 11

¹⁰⁰ S. Ironside, 'Combatting Ambush Marketing', (May 2007) *Mark. Mag.*, 26-27, p.26-27

‘promotional activity of a brand timed to coincide with a major sponsored event.’¹⁰¹ The conceptual framework and a balance argument is one where it can be argued that no middle ground can ever be reached. In terms of creating the correct balance and finding the middle ground between the sponsor’s contractual duty and the non-sponsors right to have a presence, seems neither possible in theory or practice. The conceptual framework now seems to be a balancing game, and unless a farfetched utopian solution can be provided, the pendulum will keep swinging from side to side. It is clearly unfair that event organisers are pushing for strict laws that prohibit others from benefiting from an event, especially for small businesses. On the other hand, it is unfair for non-sponsors to take away the exclusivity that official sponsors pay for to enjoy? It is therefore prudent to link the concept with the ‘swinging pendulum’ debate. From 1984 until 1996, ambush marketers enjoyed paramount success, by ambushing the Games via athletes, broadcasting, advertising and intrusion within the stadium. Post 1996, the pendulum began to swing towards the organisers, as they demanded anti-ambush legislation, in return for hosting the Games. With the London Olympic Games approaching, the pendulum is firmly on the side of the organisers as more stringent laws are proposed. The current situation also raises the question as to whether it is ethically acceptable for the state to provide favourable legislative regimes for selected businesses.¹⁰² Such tension threatens to upset the balance between freedom of expression and official sponsors, potentially swinging the pendulum back towards non-sponsors. As Stoch commentates ‘...I expect that it will take just one notable ambush marketing penalty, such as jail time for a local business owner, for the pendulum to start swinging back again...’¹⁰³

From a consumer perspective, there is a clear divide between the two outcomes and no sign of any possible middle or higher ground. However, Seguin et al’s Olympic research in 2005 depicted that 88% of respondents were unaware of any non-sponsors attempting to represent themselves as official sponsors. Additionally, 50% of the respondents believed that a non-sponsor should not associate with the Olympics and a further 43% deemed it to be unethical.¹⁰⁴ The crux of the matter is that if the event organisers spent half as much of their time educating consumers on the rationale and application of ambush marketing, rather than campaigning for tougher sanctions, then surely more consumers will deem ambush marketing

¹⁰¹ A Portlock and S Rose, ‘Effects of Ambush Marketing: UK consumer brand recall and attitudes to official sponsors and non-sponsors associated with the FIFA World Cup 2006’, *International Journal of Sports Marketing and Sponsorship*, 2009, 275

¹⁰² S Corbett & Y Van Roy, ‘Events Management in New Zealand: one law to rule them all?’, (2010) *JBL*, 338

¹⁰³ *ibid*

¹⁰⁴ B Seguin et al, ‘Internationalising Ambush Marketing: a comparative study’, *International Journal of Sports Marketing and Sponsorship* 2005 6(4) 219

to be unethical.¹⁰⁵ For example, the organising committee for Vancouver consulted and educated the public for the winter Olympics in 2010.¹⁰⁶ This was a unique technique and kept the committee out of legal proceedings and their sponsors happy.¹⁰⁷ It is interesting to see that London, while incorporating strict elements in the law, has opted against educating the public.¹⁰⁸ How do they expect to receive positive support for their anti-ambush campaigns?

Surprisingly, the ethical theories are the most positive aspect of this discussion. They provide concrete answers and illustrate ambush marketing to be an unethical and immoral practice. One could argue that the conclusions are reliable, as two opposed theories have been utilised for the same purpose. It will definitely be interesting to see whether the same outcome can be demonstrated when even more ethical theories are utilised. Perhaps further research in this area will finally answer the ethical/good business debate.

Now that ambush marketing has been discussed in some detail, the legal aspects can now be firmly concentrated upon. As discussed above, the upper hand lies is firmly with the organiser and they are intent on enacting stricter legislation. It has been established that ambush marketing can be imaginative, but also very immoral, especially if done so with the intention to deceive. The following chapters will concentrate on UK Intellectual Property laws. Firstly, a critical discussion on the Olympic Games and Paralympic Games Act 2006 will be presented. The discussion will look to evaluate the adequacy of the law and whether the Act is a proportionate response to the threat of ambush marketing, especially when taking into account the imaginative methods. Secondly, the Act received much criticism from non-sponsors and mainly advertisers, who deemed trademark law and passing off to be adequate enough to deal with the threat of ambush marketing at the Games. Therefore an analysis of trademark law and passing off will also be carried out. One issue is clear, whilst legal activity to counter ambush marketing will continue to be deployed, so too will the irresistible attraction of “getting something from nothing” through ambush marketing.¹⁰⁹

¹⁰⁵ B Seguin and NJ O’Reilly, ‘The Olympic Brand, Ambush Marketing and Clutter’, *Journal of Sport Management and Marketing*, 2008 pg 67

¹⁰⁶ D Ellis et al, ‘Ambush Marketing, the Olympics and Paralympic Marks Act and Canadian National Sports Organisation: Awareness, Perception and Impacts’ *Journal of Sports Management* 2011 4(3), 255

¹⁰⁷ J Storch, ‘It’s An Ambush! Or Is It?’, *Marketing magazine* vol 115(6) 17/5/2010, 38

¹⁰⁸ *Ibid*

¹⁰⁹ F Farrelly et al, *Defending The co-branding benefits of sponsorship B2B partnerships: The case of ambush marketing*, *JAR*, 2005 p 346

CHAPTER TWO

In this chapter, the London Olympic Games and Paralympic Games Act 2006 (hereon 'The London Act') will be interrogated, along with some of its main components and its capability in terms of protecting against ambush marketing. Study of this Act is absolutely crucial for two reasons: a) the passing of the Act was deemed to be a 'necessity' by the IOC and b) whilst the Act was proceeding through Parliament, it attracted some heavy criticism, concerning its perceived severity. In terms of the main components, the general defences to the Act will be assessed, the entire concept of association and the London Olympic Association Right, culminating in a detailed analysis of some of the criticisms of the Act. It will evaluate whether the Act has struck a correct balance between all parties concerned. In the previous chapter, it was highlighted that the conceptual framework for ambush marketing was about attempting to strike the right balance. The balance between sponsorship and contractual rights and a non-sponsor's right to a free market is a key theme of the phenomenon.

Some of the methods of ambush marketing were also evaluated, along with its ever-evolving nature. It can be argued that the phenomenon was evolving at such a rate, in terms of inventiveness, that ambush marketers are becoming increasingly astute at developing ways to circumvent legal attempts to control non-sponsor marketing activities.¹¹⁰ This makes ambush marketing like a game of cat and mouse. Most practices of ambush marketing actually stay just within the ambit of the law, much to the dismay of event organisers and sponsors alike. Furthermore, it can be concluded that ambush marketing is synonymous to the 'swinging pendulum' theory, in favour of the sponsors and organisers at this stage. Would it be fair to argue in this instance that a more stern approach should be required for London? This brings forth a second question on the balance of rights: 'How can we categorise exactly what a strong approach is, and how far the can legislation go before it becomes a disproportionate or counterproductive response to the phenomenon?'

Thus, the arguments below need to analyse the law from two separate perspectives. Are the main components of the Act a proportionate, effective and well-balanced response to the

¹¹⁰ S. Bhattacharjee & G. Rao, 'Tackling Ambush Marketing: The Need for Regulation and Analysing the Present Legislative and Contractual Efforts, Sport in Society, Vol9, no 1, January 2006 pp133

problems caused by ambush marketing? On the other hand, are the main components of the Act an entirely disproportionate and draconian response? Of which causes a significant imbalance between the free advertising market and sponsors?

The conceptual framework for assessing whether the London Act is a 'proportionate' is an important concept. What do we mean by a proportionate response? A proportionate response of the London Act is one that aims to deal with the phenomenon in a manner that cannot be done so utilising existing law. It will also attempt to balance the interest of all concerned parties as far as it possible to do so. In other words, the best way to measure what is proportionate is by comparing it to what is disproportionate.

The London Olympic Games and Paralympic Games Act 2006

The London Act was passed shortly after London secured the right to host the 2012 London Olympic Games. The IOC requires all host cities to have an effective strategy in place, and a guarantee confirming that prior to the commencement of the Games, specific legislation will be enacted as a necessity to reduce and effectively control ambush marketing.¹¹¹ This is to ensure their sponsors are afforded the highest level of protection available. Hence, the implementation of the London act was inevitable. The relevant sections of the Act are designed to protect against ambush marketing and are designed to protect Olympic Intellectual Property. For example protection against the use of the Olympic logo and mottos elevates the Act into the same category as everyday Intellectual Property law such as copyrights and trademarks and will contain similar elements. The legislation is required to initially cover the focal Olympic symbols¹¹² as well as the city, year, venue, official emblem of the games amongst others.¹¹³ The passing of the Act saw the creation of the London Olympic Association Right, which is a sui generis concept that aims to prevent perpetrators from using inventive methods of making an association with the games without the consent of the London Organising Committee.¹¹⁴ It will apply to any action, which creates an association from March 30, 2006 through to December 31, 2012. The London Olympics Association Right involves using any representation in a manner that is likely to deem to the

¹¹¹ Clause 48(c) of the Host City Contract

¹¹² Which is already protected by the Olympic Symbols etc. (Protection) Act 1995

¹¹³ IOC requirements on Brand and Ticket protection.

¹¹⁴ Pauline Dore, 'Olympics prompt ambush marketing clampdown' *Managing Intellectual Property*, 09605002, Dec2005/Jan2006 155

public an association between the London Olympic Games and the representation, and/or its goods and services.¹¹⁵

As a proprietor of the London Olympic Association Right, The London Organising Committee can instigate civil proceedings against advertisers and thwart the publication of advertising through injunctive measures.¹¹⁶ What this will mean for advertisers is that they may not be able to ‘publish and deal with the problem later’, though certain larger business entities may wish to utilise this approach. An immediate disadvantage shows that the fine for breaching advertising regulations is a meagre £20,000.¹¹⁷ This amount is insufficient for larger companies who would wish to participate in ambush marketing, and would be happy to pay the fine. This is because the value of the fine is miniscule when compared to the potential profit gains and consumer confusion that they could cause, which can be gargantuan.¹¹⁸ Furthermore, infringement of the right can also lead to criminal proceedings. The right, since its conception, has been labelled as ‘grossly extending UK law in order to protect a small and specific commercial group’, and ‘going far beyond any legislation introduced anywhere in the world’.¹¹⁹ It will be examined below to see if these criticisms are warranted, and whether the introduction of the right is the correct response to the problem of ambush marketing.

The Main Components of the Act

Immediately below, are the components of the Act that are deemed to be ‘standard’ inclusions in any legislation that aspires to protect against ambush marketing.

The Act imposes a duty on the Secretary of State to make regulations in order to control advertising in the vicinity of Olympic venues in order to fulfil the strict regulations imposed by the IOC.¹²⁰ The regulations specify the nature and extent of the restrictions, including the place, time period and type of advertisement to which these restrictions would apply.¹²¹ These regulations will apply only for a period stipulated by the Secretary of State, which he

¹¹⁵ LOGPGA, Sch.4, para 1(1)

¹¹⁶ J Magnay, ‘LONDON 2012: Government plans to stop companies cashing in on London Olympics and to improve security at venues’, The Daily Telegraph 8th March 2011, edition 1, accessed at Lexis Nexis 09/03/11

¹¹⁷ *Ibid* Section 21(1) and (3)

¹¹⁸ During the aftermath of Nike’s notorious ambush of Reebok at the 1996 Olympics, over 50% of respondents in survey incorrectly believed Nike to be the official sponsor of the Games.

¹¹⁹ Anon, ‘Opinion: The Olympics Bill is an attempt to ambush a fantastic event with draconian legislation’ The Lawyer 30 January 2006

¹²⁰ LOGPGA sec 19(1)

¹²¹ *Ibid* Sections 19(3), (4), (5) and (6)

deems to consider as necessary to comply with the host city contract. Anybody who is seen to infringe any of the regulations will commit a criminal offence punishable by a fine of up to £20,000.¹²² Due to the lucrative nature of any possible infringement, the Magistrates have the power to fine the above amount, which is significantly higher than their usual limit. The Secretary of State is under a duty to consult with the advertising agencies before recommending/making any regulations.¹²³

The London 2012 Organisers have concurred a deal with each of the outdoor site owners to guard against unfair price rises, in addition to an agreement to fix pricing structures. Furthermore, the outdoor site owners must give first right of refusal over each and every site to an official Olympic sponsor. Looking back at some of the effective methods of ambush marketing in Chapter one, such as the buying of billboards near the Olympic venue or giving out free samples of non-sponsor's branded products near the stadia, giving the sponsors first refusal means that they can alleviate the threat of ambush marketing instantly. This is of huge significance. Choosing not to take over an outdoor site is done so at their own peril.

The Act imposes a duty on the Secretary of State to make regulations to control trading in the vicinity of the Olympic venue.¹²⁴ A report published by the Olympic Delivery Authority (ODA) stated that the regulations would come into force no earlier than June 2011 and will be part of a new Act of Parliament.¹²⁵ It is envisaged that the regulations will specify the types of advertising and trading which are to be affected. It is foreseeable that billboards, posters and imaginative forms of advertising such as laser lights, give-aways and aerial advertising, conveniently all popular methods of ambush marketing used previously, will be strictly regulated. That said, there will be exceptions to the regulations, which will seek to allow some forms of advertising and trading, on condition that they do not conflict with the overall aims of the regulations.¹²⁶ The appendix in the strategy document goes on to state that if there are 'normal shop signs, advertising the name of the retailer or types of products being sold along with normal window displays would be exempt from the regulations'. It is therefore submitted that the ODA is showing here that the Act is not as strict upon advertising for local businesses as it will include exemptions, and allow them to advertise their goods.

¹²² *Ibid* Section 21(1) and (3)

¹²³ *Ibid*, Sec.19(6)(a)

¹²⁴ *Ibid* Sec.25(1)

¹²⁵ Olympic Delivery Authority, London 2012: Advertising and street trading regulations Strategy, June 2009 <<http://www.london2012.com/documents/imported/advertising-and-street-trading-regulations-detailed-document.pdf>> accessed 01 February 2011

¹²⁶ *Ibid*

However, the example utilised in the appendix discusses ‘normal shop signs’ and ‘normal window displays’, this seems to indicate that the businesses will not be allowed to make any associations with the Olympics whatsoever, and be subjected to the listed expressions (see below). This is good evidence that the Act has been introduced with the intention to allow businesses to operate normally, and thus far seems to be a balanced response to the problem of ambush marketing.

Like many Intellectual Property laws, the Act has a list of potential exemptions from liability. Prior to the London Act, most traditional Intellectual Property laws have a defence based on honest commercial practice.¹²⁷ If this element could be shown, one would probably escape liability. The London Act narrows the exemptions and one can no longer rely upon honest commercial practice. Therefore, one will be exempt if they can show: -

Use of the Olympic word, motto or symbol, a controlled representation, as a necessary incident of publishing or broadcasting a report of a sporting or other event forming part of the Olympic Games;¹²⁸

Use of a controlled representation as a necessary incident of publishing or broadcasting information about the Olympic Games;¹²⁹

Use of a controlled representation as an incidental inclusion in a literary work, dramatic work, artistic work, sound recording, film or broadcast;¹³⁰

Use of a controlled representation in the course of advertising in either of above two items;¹³¹

Use of a protected word in a context which is not likely to suggest an association between person, product or service and the Olympic Games or the Olympic Movement;¹³² and

Use of a controlled representation in relation to goods, if the controlled representation was already on the goods when they were put on the market in the European Economic Area by the proprietor or with his consent.¹³³

¹²⁷ For more information, see: J Harris, ‘Walking the tightrope: Honest use of third party trademarks’ July 2011 <http://www.kemplittle.com/html/stay-posted/publications/kl-bytes/July%202011/walking-the-tightrope-honest-use-of-third-party-trade-marks.html?SESSIONFRONT=30a330264b2184ce7a10a7bd8a568e00> last accessed 01 September 2011

¹²⁸ LOGPGA, Sch.3, s.4(1)(a)

¹²⁹ *Ibid*, Sch.3, s.4(1)(b)

¹³⁰ *Ibid*, Sch.3, s.4(1)(c)

¹³¹ *Ibid*, Sch.3, s.4(1)(d)

¹³² *Ibid*, Sch.3, s.4(2)

Assessing these exemptions, it is quite clear how stringent they are when compared to traditional Intellectual Property laws, where honest commercial practice is widely utilised as a defence. So, it can be implied that one would not be permitted to utilise any Olympic intellectual property, and then claim honest commercial practice. It is evident that one who is caught breaching the Act, whether it is via honest commercial practice or not, would be impeded by the Act. The exemptions mentioned only seem to cover publishing, broadcasting and controlled representations on goods prior to the Act. A news article published in *The Lawyer*, argues that defences that have been incorporated into the Act do not go far enough to provide a fair balance to the legislation. The author states ‘...Just about any reference to the Olympic games in London will create an association... as that is the purpose of making an association in the first place...’¹³⁴ thus claiming a disproportionate response. On the other hand, this also indicates that the organisers and the government wanted to cast their nets far and wide, to ensure that the protection of the integrity of the Games is a priority and circumvention of the Act is hindered.¹³⁵ It is apparent that the narrow defences are designed to add further protection to the organisers, whilst simultaneously, effectively decreasing the use of any Olympic material in commercial practice by unauthorised use, whether done so in honest circumstances or not. Looking back at some of the methods of ambush marketing mentioned in chapter two¹³⁶, because of its ingenious nature, such a tough control on usage of Olympic material is potentially a proportionate response if LOCOG are to fulfil the obligation placed upon them by the IOC.¹³⁷ Furthermore, if the legislators were to keep the defences akin to those of Intellectual Property law, then there would be no reason to introduce additional legislation as a means to protect against ambush marketing. This is because there would be no logical justification of enacting new legislation if it was a ‘carbon copy’ of already existing legislation. Let us also bear in mind that the legislators have to be seen to be actively attempting to prevent ambush marketing even more so than any existing domestic laws that may already combat against it.¹³⁸ This is because of the sheer amount of

¹³³ *Ibid*, Sch.3, s.4(4)

¹³⁴ Anon, ‘2012 Olympics Games sponsor protection goes too far’ *The Lawyer*, reported 17/06/2006 <<http://www.thelawyer.com/2012-olympic-games-sponsor-protection-goes-too-far/120981.article>> accessed 01 February 2011

¹³⁵ Bill Watson, Protecting sport sponsors from Ambush, BBC News, January 2006. <<http://news.bbc.co.uk/1/hi/business/4719368.stm>> accessed 01 March 2011

¹³⁶ Such as attempts to ambush around the vicinity of the stadia

¹³⁷ Host City Contract for the Games of the XXX Olympiad in 2012 – 08.06.2005 at point 48.C, pp 25 <<http://www.gamesmonitor.org.uk/files/Host%20City%20Contract.pdf>> accessed 10 March 2011

¹³⁸ S. Bhattacharjee & G. Rao, ‘Tackling Ambush Marketing: The Need for Regulation and Analysing the Present Legislative and Contractual Efforts’, *Sport in Society*, Vol9, no 1, January 2006 pp 143

capital exchanged between the IOC and its sponsors. The narrow defences rule has the potential to be a masterstroke and this is because it can hinder perpetrators from attempting to hide behind the ‘honest commercial practice’ rule, when indeed they were attempting to create a false association. By enhancing the legal fishnet, there is an improved probability of preventing inventive ambush marketing attempts, and for the purposes of this chapter, makes it a balanced response to problem of ambush marketing.

What is meant by ‘association’?

The crux of ambush marketing is ‘association’.¹³⁹ A successful ambush would see a company associate itself with an event without facing any legal sanctions, and at the same time, gaining the same level of coverage and advantage as an official sponsor.¹⁴⁰ An association for the purposes of the Act will include any kind of contractual relationship, commercial relationship, corporate or structural connection or the provision of financial or other support for or in connection with the London Olympics.¹⁴¹ Therefore, a combination which agrees with honest practices including those in commercial matters, and does not make any commercial, or promotional use of a representation in conjunction with the Olympics, is not an association under the ambit of the Act.¹⁴²

The Olympic Symbols etc. (Protections) Act was passed in 1995. It deals with the issue of association by giving the BOA the power to control the use of the Olympic symbol, motto and phrases.¹⁴³ Under the Act, the Olympic Association Right would have been infringed if one, in the course of trade, used a ‘representation’ of any of the protected subjects, or used something so similar, as to create in the mind of the public, an association with the Olympics.¹⁴⁴ This poses the question, mainly by critics of the London Act: ‘for what purpose was there a need to enact the London Act when the Olympic Symbols Act was in force and seemed to deal with this issue of ‘association’?’¹⁴⁵ The answer being that there was an inherent difficulty in defining the notion of ‘association’. Furthermore, determining exactly what evidence is required to ascertain the necessary ‘association’ to consequent a breach of

¹³⁹ N Hickett *et al*, ‘How to avoid an IP ambush’, *Managing Intellectual Property*, 190, June 2009 pp12

¹⁴⁰ J Storch, ‘It’s an Ambush! Or is it?’ *Marketing Magazine*, 115(6) 2010, pp 38

¹⁴¹ LOGPGA, Sch. 4

¹⁴² LOGPGA, Sch. 4 para 1(2)(b)

¹⁴³ Olympic Symbols etc. (Protections) Act 1995 (OSPA) sec 3

¹⁴⁴ S Groom, *Ambush Marketing/Olympics Bill*, (no date) <<http://www.marketinglaw.co.uk/open.asp?A=1281>> accessed 02 March 2011

¹⁴⁵ P Dore, ‘Let the Games Begin’ *I.S.L.R.* 2006 pg44

the Act was often rather ambiguous.¹⁴⁶ To determine the requisite ‘association’ would have depended upon the assessment of consumer confusion; Hoek and Gendall highlighted this problem arguing that typically claimants seek to establish the confusion element through a number of surveys that is often flawed in its research methodologies.¹⁴⁷ Additionally, surveys are deemed to be highly vulnerable in courts due to the lack of a ‘benchmark level of confusion’ and of course the somewhat cautious attitude of the courts in dealing with evidence which originates from a survey.¹⁴⁸ Taking into account the research unearthed by Hoek and Gendall, this undoubtedly would have presented a potential claimant with significant problems when attempting to challenge an issue of ‘association’ in the English courts. Consequently, for the purposes of this chapter, this would therefore have made the legislation inadequate for the purposes of effectively protecting the Olympic Games, and for the purposes of this thesis, such problems in establishing ‘association’ clearly is not ‘event-holder’ friendly, thus making it extremely difficult for the IOC to effectively challenge ambush marketing. By enacting the London Act, and in particular, the London Olympic Association Right, it is arguable that it was done so in an attempt to clarify the ambiguity surrounding ‘association’ in previous versions of the Act.¹⁴⁹ As such, the ‘association right’ now entails representations that suggest some kind of external association more akin to a sponsorship relationship, which also seems to widen the ambit of the Act, thus making the clarification on ‘association’ a proportionate response.¹⁵⁰

It is clear that by attempting to control exactly how one can associate with the Games is, in fact, crude law making on behalf of the legislature. Ultimately, the Act seeks to deal with this issue of ambush marketing by ‘association’ ‘head on’. This is immediately comparable to trademark law, where an actual breach of registered trademark is required before any action can be brought and even the Olympic Symbols Act, which the evidence above indicates may

¹⁴⁶ S. Mckelvey and John Grady, ‘Sponsorship Program Protection Strategies for Special Sporting Events: Are Event organizers Outmanoeuvring ambush Marketers’, *Journal of Sport Management*, 2008, pp575

¹⁴⁷ For example, after almost all major events, surveys are carried out by event-holders and their associates to ascertain consumer awareness of the official sponsors. In the 1996 Olympics, consumer surveys indicated that more than 50% of consumers thought that Nike was the official sponsor, when instead it was Reebok. If Nike had utilised any of the protected Olympic words, here in the UK, then the BOA could have taken action against the company and would have resorted to utilising the surveys that had been carried out.

¹⁴⁸ J Hoek and P Gendall, ‘David takes on Goliath: An analysis of survey evidence in a trademark dispute’, *International Journal of Market Research*, 45, pp117

¹⁴⁹ S Groom, *Ambush Marketing/Olympics Bill*, (no date) <<http://www.marketinglaw.co.uk/open.asp?A=1281>> accessed 02 March 2011

¹⁵⁰ N Johnson, ‘Caught with its pants down’, Osborne Clark 2005, <<http://www.marketinglaw.co.uk/open.asp?A=1402>> accessed 01 March 2011

have copious amounts of problems in establishing ‘association’.¹⁵¹ Stone agrees with this notion,¹⁵² in support of the Act. He states that,

‘...it [the Act] is designed to catch those who seek an association with the Olympics that they have not paid for, without having to list exhaustively all the ways ambush marketing could be illegal...’

Restricting association by widening the scope of the Act, in essence, severely limits ambush marketers from making any types of false association.

There is also no requirement for ‘trademark use’, meaning the symbol, motto or word used does not have to act as a designation of source or origin. This is a fundamental difference to the protection offered to registered trademarks under the Trademarks Act 1994. Clearly this aspect of the Act *prima facie* seems to provide a much higher level of protection than trademark law.¹⁵³

Infringement

The London Olympic Association Right is infringed when a person in the commercial context uses, in relation to goods or services, any representation in a manner likely to suggest to the public that there is an association between the representation and the London Olympics.¹⁵⁴ The use of the representation must be done so in the course of trade without the consent of the London Organising Committee.

A unique aspect of the Act provides protection for certain listed expressions. For example, if certain words were used in combination with other words, this would give effect to an evidential burden that the London Olympic Association Right has been infringed.¹⁵⁵ The current provisions provide that a court may take into account certain combinations of words utilised when evaluating whether the right has been infringed. This provision has been somewhat weakened from the initial draft of the bill, which provided that the use of any such combination would be presumed to have caused an association in the mind of the public.

¹⁵¹ *Ibid* at 30

¹⁵² D Stone, ‘Opinion: The Olympic Games cannot survive without sponsors and those sponsors need legal protection’ *The Lawyer*, 16th January 2006

¹⁵³ London 2012: Not the golden opportunity advertisers were hoping for? <<http://www.speechlys.com/file.axd?pointerid=a5651c1bbe8347e78f30aa7a127a1c76&versionid=64f406c602c54255b5cf9f8bf66c92cd>> accessed 28 January 2011

¹⁵⁴ LOGPGA, sch.4 para.2

¹⁵⁵ J Magnay, ‘LONDON 2012: Government plans to stop companies cashing in on London Olympics and to improve security at venues’, *The Daily Telegraph* 8th March 2011, edition 1, accessed at Lexis Nexis 09/03/11

Industry criticism has noted that the expressions in Columns A and B are “arbitrary and unnecessarily restrictive”¹⁵⁶

Column A	Column B
Games	Gold
Two Thousand and Twelve	Silver
2012	Bronze
Twenty twelve	London
	Medals
	Sponsor
	Summer

Figure 1- Listed expressions

The intentions of the legislature were clear when the bill was proceeding through parliament. They wanted to create a law that was feared by ambush marketers, hence entering a somewhat bizarre provision regarding infringement. They initially proposed that use of the listed expressions would lead to automatic infringement. They had also intended to reverse the presumption of guilt onto the defendant to show that they had not created an association with the Games. Dore refers to the possible reversal of the burden of proof as ‘unprecedented’ and ‘contrary to the very basic principles of the English legal system’.¹⁵⁷ However after much criticism and vigorous lobbying, the bill was reworded, and the reversed presumption of guilt dropped.¹⁵⁸ Justification of the reversal was done so by the government, claiming that it was of an evidential nature as opposed to an actual presumption of guilt. I.e. if the evidence was clear then one would be in a position to prove to the court how they did not create an association.¹⁵⁹ Lord Clement-Jones struck such a proposal out of the legislation citing ‘...the reversal of the burden of proof is entirely disproportionate in legislation that is designed essentially to protect the commercial interests of the IOC and LOCOG. The burden

¹⁵⁶ N Groom, ‘Ambush Marketing/Olympics Bill’, (no date)
<http://www.marketinglaw.co.uk/open.asp?A=1281> accessed 01 March 2011

¹⁵⁷ P Dore, ‘Let the Games Begin’ I.S.L.R. 2006 pg44

¹⁵⁸ A Blakely, London Olympic Games and Paralympic Games Act 2006: Less presumptive than the London Olympics Bill (legislative Comment), Entertainment Law Review, 2006, pp183

¹⁵⁹ Lords Hansard text for 15th February 2006 (60215-31)
http://www.publications.parliament.uk/pa/ld200506/ldhansrd/vo060215/text/60215-31.htm#60215-31_head1
 accessed 03 March 2011

should be on LOCOG to prove the guilt of an alleged transgressor, not the other way round...'¹⁶⁰

More interestingly, the IOC does not have any concrete requirements as part of the host city contract that legislation needs to have a reversal of the burden of proof. It seems as if the government in this instance was aiming to create something, which was neither required nor warranted. Lord Clement-Jones regarded this as an instance of our government 'Gold Plating' the host city's contract.¹⁶¹ It was wholly unjustifiable and furthermore, predecessors of the London Act such as the Beijing, Athens and Sydney Acts had no such presumption instilled. This is clearly one of the elements of the Act that has warranted the criticism that it faced during its procession through Parliament. It is also an element, which if introduced, would have created definite legal uncertainty, not to mention a detrimental impact upon the advertising economy.¹⁶² Furthermore, had the presumption of guilt been reversed, that would unmistakably have been deemed as overly protective law making by the government because such a presumption was never required.

Secondly, the purpose of the Act was to protect against ambush marketing and it seemed utterly ludicrous that one, who would have absolutely no intention to breach the law, would probably have to collate evidence in advance with the expectation that they might have to prove their innocence under this legislation at some point in the future. To have proposed to put such level of burden upon an alleged transgressor would have been unfair and would also have caused a clear imbalance between the Act and the phenomenon. The House of Lords was clearly responding to such matters. The stance of Lord Clement-Jones was plain to see, in that the presumption of guilt should rest with the party claiming an injustice, and so it is.

The Secretary of State also has the power to add, remove or alter an entry in either group of expressions to meet the challenging ambush practices at that time.¹⁶³ However, the government has listened to the criticisms regarding this provision (see below) and has also imposed a duty on the Secretary of State to consult with the advertising industry prior to recommending any changes to these lists.¹⁶⁴ By looking at some of the exceptions that have been added onto the London Olympic Association Right; anybody who is seen to contravene the right and is not subject to the general exceptions, will be infringing the London Olympic

¹⁶⁰ *Ibid*

¹⁶¹ *Ibid*

¹⁶² *Ibid*

¹⁶³ LOGPGA, Sch. 4 para 3(6)

¹⁶⁴ LOGPGA, Sch.4, s.3(9)

Association Right. The main exceptions include: utilising the expressions as a necessity when publishing or broadcasting either a report or information forming part of the Olympic Games; using the expressions as an incidental inclusion in a literary, dramatic or artistic works, sound recordings film or broadcast; and use of a registered trademark. One commentator argues that the defences are too narrow in respect of the London Olympic Association Right. The right is infringed by any representation that creates a likelihood of association, in the mind of the public, with the Olympics. This implies that any reference to the Games would be enough to cause a likelihood of association.¹⁶⁵ S/he further questions the reasoning behind the Act as to why the defences concerning association are not the same as other laws designed to protect against ambush marketing, such as trademarks and the OSPA 1995? The author argues,

‘...Surely the touchstone should be whether there is any confusion in the mind of the public that the business has endorsed, or is somehow connected with the Olympics. If that touchstone is adequate for in all other circumstances then why not for the Olympic organisers...?’¹⁶⁶

What the author is implying is that in areas such as trademark law and the Olympic Symbols Act, it must be shown that a business has endorsed and connected with the Olympics in the mind of the public, thus having breached Olympic Intellectual Property rights. Why not have such levels of defence as opposed to mere association?¹⁶⁷ Fraser argues that the Olympic Symbols Act simply was not stringent enough to protect against ambush marketing for the reasons mentioned above with reference to difficulties in establishing association.¹⁶⁸ Furthermore, it can also be argued that one of the main reasons that trademark law is seen as inadequate, is because of the potentially wide defences that ambush marketers could exploit to avert liability.¹⁶⁹ The organisers are under a specific contractual duty to protect their sponsors and the only way this can be achieved is through legislation that adds to the already existing ones to create a ‘team’ of various laws that would all be effective in protecting the London Games. Yes, it is arguable by some that the narrow defences in the Act are somewhat

¹⁶⁵ Anon, ‘2012 Olympics Games sponsor protection goes too far’ The Lawyer, reported 17/06/2006

¹⁶⁶ *Ibid*

¹⁶⁷ Anon, ‘2012 Olympics Games sponsor protection goes too far’ The Lawyer, reported 17/06/2006
<<http://www.thelawyer.com/2012-olympic-games-sponsor-protection-goes-too-far/120981.article>> accessed 01 February 2011

¹⁶⁸ A Fraser, ‘Olympic Bill comes under attack’ BBC Sport, 2005,
<http://news.bbc.co.uk/sport2/hi/other_sports/olympics_2012/4744983.stm> accessed 01 March 2011

¹⁶⁹ S. Mckelvey and John Grady, ‘Sponsorship Program Protection Strategies for Special Sporting Events: Are Event organizers Outmanoeuvring ambush Marketers’, Journal of Sport Management, 2008, pp559

draconian.¹⁷⁰ However, such measures are justified on the basis of protecting the sponsors and their huge sponsorship fees.

The combination for a potentially infringing representation now require any word from column A to be united with another word from column A or column B.¹⁷¹ It seems to be clear that the specified words need not be next to each other to fall within the ambit of the act, so the phrase “keep active and play outdoor games this summer” would be classed as a specified combination of the listed expressions. Harris¹⁷² argues that somewhat alarmingly, the London Olympic Association Right is not merely related to specific elements of the Olympic brand, but instead to the London Olympics as an entity, which in theory monopolises anything that the public believes to be connected to the Olympics. He asserts that the ‘listed expressions’ are but a mere attempt ‘to give the act some kind of boundary, albeit an indefinable one’. He also argues that the introduction for the protection of a blanket “association” right is designed to strike fear into brand owners and lawyers. This is because in the absence of factual and definable boundaries. Hence there is no way of saying exactly what will breach the London Olympic Association Right.

It has been argued that one issue is crystal clear from the Act thus far, regular business using expressions such as ‘2012’, ‘London’ and so on in any promotional material, would infringe the London Olympic Association Right.¹⁷³ For example a pub may advertise ‘Come watch the 2012 Games here live!’ on their chalkboard outside and infringe the London Association Right. Bizarrely, the same board without the name of the Pub would not technically infringe the Act. This would be because the name of the business is not in close proximity to the listed expressions. The author suggests that this seems to defeat the entire purpose of local businesses benefiting from the Olympic Games.¹⁷⁴ This is quite an extreme view and one aspect of the Act, since its passage through the House of Lords, is clear, there will be no blanket ban on the use of the listed expressions. The example above would face no legal implications as the Act is designed to protect the more imaginative forms of association and ambush marketing. LOCOG are not going to waste their time, effort and money to stop a

¹⁷⁰ C Mariner, ‘Advertisers cry foul over Ambush law’, The Guardian, August 2005

¹⁷¹ LOGPA, Sch4. Para 3(1)

¹⁷² Paul Harris et al, ‘Ambush Marketing and London 2012: A golden opportunity for advertising, or not?’ Entertainment Law Review, 2009, pp75

¹⁷³ Darren Davidson, ‘Does 2012 need anti ambush laws?’, Campaign UK, 0008239, 3/3/2006

¹⁷⁴ *Ibid* at 31

public house from advertising that utilises the listed expressions.¹⁷⁵ Lord Davies, during the first reading, was quick to make transparent this area by stating ‘...contrary to some press reports, there will be no blanket ban...factual references will be perfectly legal...’¹⁷⁶ The example above shows some of the misconceptions that have been formed about the listed expressions since the Act’s introduction. These contradict the views of academics such as Harris. Under the laws of common sense, it is arguable that public houses do not breach any Olympic Intellectual Property. It would be perfectly safe to advertise as it is more a method of attracting customers as opposed to creating a false association to the London Olympics. A concrete example of LOCOG’s flexibility can be seen where they allowed the sustenance and beverage company ‘Little Chef’ the right to retain their Olympic breakfast menu, without any legal action.¹⁷⁷ A spokeswoman for Little Chef stated that following talks with LOCOG, they would be able to keep the items on its menu during the Olympics. Groom also agrees by noting that the current version of the Act promotes greater clarity about the concept of association. Hence, if the use is not likely to suggest an association with the London Olympics, then this will constitute as a defence to the infringement of the London Olympic Association Right.¹⁷⁸ David Stone argues ‘...the opposition [in terms of association] is misconceived...’ and goes on to argue that the Games could not possibly survive without the sponsors who need this level of legal protection.¹⁷⁹ Based upon some of the examples of ambush marketing displayed in recent years mentioned in Chapter one, and the subtlety of ambush marketing, it is fair to argue that Stone clearly has a valid point.

The above is agreed by Phillip Johnson,¹⁸⁰ who argues that the use of the listed expressions in their diluted forms, are unlikely to have any real impact upon proceedings relating to the London Olympic Association Rights. This is because the court may, not shall, take such a combination into consideration and ultimately, it may not take them into account. He further opines that it is difficult to understand why a court would need to take into account any of the

¹⁷⁵ LOCOG have assured that the majority of businesses will operate as normal.

<<http://www.london2012.com/news/2009/06/london-2012-outlines-street-trading-and-advertising-plan.php>> accessed 01 March 11

¹⁷⁶ Lords Hansard text for 11th January 2006, Column 252 (60111-22)

<http://www.publications.parliament.uk/pa/ld200506/ldhansrd/vo060215/text/60215-31.htm#60215-31_head1> accessed 03 March 2011

¹⁷⁷ F Ramsay, ‘Little Chef in Olympic Win’ Marketing Magazine, July 2009, pp 3

¹⁷⁸ N Groom, ‘Ambush Marketing/Olympics Bill’, (no date)

<<http://www.marketinglaw.co.uk/open.asp?A=1281>> accessed 01 March 2011

¹⁷⁹ D Stone, ‘Opinion: The Olympic Games cannot survive without sponsors and those sponsors need legal protection’ The Lawyer, 16th January 2006

¹⁸⁰ Phillip Johnson, *Ambush Marketing: A Practical Guide to Protecting the Brand of a Sporting Event*, (Sweet and Maxwell London, 2008), page 133

listed expressions for any trivial claims brought before them. For example, no court will take into account the combination in “sponsor of the 2012 Carling Cup”. Similarly, they may take into account “come to London to see the Games” especially if it seems to create a clear association with the Games. Therefore, it is arguable that despite the publicity surrounding the listed expressions, the provision will only be effective in establishing a marginal case of infringement, where everything is equally balanced. Nonetheless, the expressions can be utilised effectively to create an adequate enforcement strategy, which LOCOG will use as a measure to keep some traders/businesses on the correct side of the law.

This indicates that the correct balance has been struck between the Act and ambush marketing by association. It also implies that the stigma attached to the Act may not have any element of truth in terms of its unreasonableness. In light of the above opinion by Johnson, and some of the criticisms expressed thus far, the courts, strictly speaking, are under no legal duty to take into account any of the listed expressions. Therefore, it is submitted that the criticisms of the Act may not be warranted. Even if LOCOG were to apprehend an alleged transgressor of the Act, the court has the right to completely disregard the listed expressions. Furthermore, by not having a duty to take into consideration the listed expressions will, as a direct result, diminish any unmeritorious applications made to the court on behalf of LOCOG. An immediate duty has thus been placed upon LOCOG to treat cases in a logical and cost effective manner. This can be seen as a successful result for lobbyists on behalf of the advertisers.¹⁸¹

So far the most controversial components of the London Act have been investigated. What is clear is that it is a sound piece of legislation that has been specifically designed to do what existing legislation cannot do, i.e. to protect against the more devious methods of ambush marketing. This is agreed by Scaria who notes that the ‘measures show a very comprehensive statute, aimed at countering the different types of ambush marketing.’¹⁸² The protection is ‘seemingly wide’¹⁸³ however this just demonstrates LOCOG’s approach, that it is imperative that they safeguard their commercial partners’ investments. Conversely, it is imperative that any legislation should be enacted bearing in mind the implications that it will have on local businesses when the Olympic Games finally come to London and this can be

¹⁸¹ Anon, ‘Analysis: Marks, Set, Ambush – Associating your brand with the Olympics, July 2010, accessed at <http://www.wragge.com/analysis_6124.asp> accessed 01 March 2011

¹⁸² AG Scaria, *Ambush Marketing: A game within a game*, (Oxford University Press, New Delhi, 2008) pg 95

¹⁸³ D Cran and S Griffiths, ‘Ambush Marketing: Unsporting behaviour or fair play? Ent. L.R 2010, pp296

seen by the fact that the Act has had more negative responses than positive responses.¹⁸⁴ For example, during the lead up to the 2010 Winter Olympics, Lululemon's range of clothing that was marketed as the 'Cool Sporting Event That Takes Place in British Columbia Between 2009 and 2011 Edition' was a comparatively unsubtle means of evading the restrictions found in section 3 of the Olympic and Paralympic Marks Act 2007.¹⁸⁵ What the London Act has attempted to do is to close this loophole, whereby such references are made to the Olympics without actually utilising any Intellectual Property, but normal everyday phrases and words.¹⁸⁶ Their aim is to stop all associations being made, no matter how tenuous. Furthermore, without the London Act, there are no provisions within English Law that would be able to prohibit such ambush marketing tactics. Below, some of the concerns brought to light by various bodies in support of and against the legislation will be assessed. An overall conclusion will be derived as to the effectiveness and viability of the Act to protect against ambush marketing at the end of the chapter.

A proportionate response to ambush marketing? Or a blatant attempt to withdraw free commercial speech?

The London Olympic Association Right has attracted major criticism since its introduction. One particular critic, the Institute of practitioners in Advertising (IPA), has expressed major concerns about the amount of restrictions placed upon advertising. They go on to describe the Act as draconian and disadvantageous to regular businesses.¹⁸⁷ Furthermore the Act promotes an unacceptable breach of free speech and an attack on the rights of London businesses to profit from the Games, by impeding them from using generic expressions that most businesses would like to use in the Summer of 2012. Christopher Hackford of the IPA states that there are already plenty of safeguards for official sponsors, which cover a broad range of issues through copyright, trademarks, passing off, misleading advertising and the Olympic Symbols Protection Act.¹⁸⁸

¹⁸⁴ Darren Davidson, 'Does 2012 need anti ambush laws?', Campaign UK, 0008239, 3/3/2006

¹⁸⁵ Available at: <http://laws.justice.gc.ca/eng/O-9.2/index.html> (last visited 03 March 2011).

¹⁸⁶ Mark James and Guy Osborn, London 2012 and the Impact of the UK's Olympic and Paralympic Legislation: Protecting Commerce or Preserving Culture?, (2011) MLR 74(3) 410, 423

¹⁸⁷ Anon, 'Analysis: Marks, Set, Ambush – Associating your brand with the Olympics, July 2010, accessed at <http://www.wragge.com/analysis_6124.asp> accessed 01 March 2011

¹⁸⁸ Pauline Dore, 'Olympics prompt ambush marketing clampdown' Managing Intellectual Property, 09605002, Dec2005/Jan2006 155

Interestingly, James and Osborne argue that the provisions of the Act were not introduced because of an already existing problem based upon proactive parliamentary intervention. Consequently, this lacks a ‘... a coherent justification and are instead grounded in a political expediency that was driven by a desire to host the Olympic Games...’¹⁸⁹ They do pose a fair argument in the sense that the legislation was not enacted traditionally. For example, there was no ‘moral panic’ about ambush marketing, while parliament still chose to extend the legislation even beyond what was required by the IOC (see argument on the presumption of guilt). However one cannot hide away from the notion that very specific legislation is required to counter the ingenious methods of ambush marketing. Furthermore, the legislature will have been conscious of ambush marketing occurring even with sui generis legislation in place.¹⁹⁰ After seeing the examples of ambush marketing in Beijing 2008 and the FIFA World Cup in 2010, they will be quite content with the effectiveness of the provisions of the Act, and its ability to counter ambush marketing. Finally, the IOC is demanding a clean event, and the legislature is aspiring to provide that.

Blackshaw¹⁹¹ agrees with this notion of unneeded and unsympathetic laws and argues that instead of sponsors consistently demanding more stringent legislation, sponsors should combat ambush marketers by taking advantage of all the commercial opportunities that are readily provided by a sporting event. He also submits that generically, sponsors are large transnational companies who are more than capable of looking after themselves, without the need for protection.

Even the Newspaper Society had expressed major concerns, when the Act was going through Parliament, that the Act was too loosely worded.¹⁹² In being so, it could prevent papers and magazines from being sold if they included particular advertising and it had sought a guarantee from the government that the media should be excluded from the restrictions placed on advertising where a controlled representation were to be used. However, the Minister for Sport has reassured the media that they would be exempt from the Act.

¹⁸⁹ Mark James and Guy Osborn, London 2012 and the Impact of the UK’s Olympic and Paralympic Legislation: Protecting Commerce or Preserving Culture?, (2011) 74(3) 410, 426

¹⁹⁰ For example ambush marketing was seen in Sydney 2000, despite sui generis legislation being in place to counter ambush marketing.

¹⁹¹ Ian Blackshaw, ‘Court kick off’, European lawyer, 2010, p13

¹⁹² Anon, ‘Going for Gold in 2012’, Walker-Morris news release, no date, accessed at <<http://www.walkermorris.co.uk/content.aspx?id=371>> accessed 10 March 2011

Additionally, the sale of newspapers in the vicinity of the Games' stadia would also be exempt from the provisions of the London Olympic Association Right.¹⁹³

However, Davidson¹⁹⁴ disagrees with the criticism that the legislation has faced thus far. He believes that the government has passed the correct law and despite including a stringent section such as the London Olympic Association Right, it is a challenge for businesses that would like a presence at the Olympics, without the necessary budget. However, he argues that instead of enforcing the law at every trivial opportunity, 'nothing is stopping the official sponsors from taking on the ambush marketers by creating their own genius methods of advertising' outside the stadium that usurps their ambush counterparts. Davidson also implies that the Act creates a fertile ground for bright thinkers, both for those who can afford to be at the Olympics and those who cannot. From this viewpoint, it seems as if Davidson agrees with the stringent law. By stating that he feels the Act creates an opportunity for those, whom cannot afford to be at the Games, suggests that he also agrees with the ideology of ambush marketing.

Unsurprisingly, the BOA has stated that criticisms of the Act are unjust and that the act was a necessity due to previous ambush attempts, and insufficient protection through Intellectual Property infringement.¹⁹⁵ It maintains that if sponsorship investments are devalued by ambush marketing, then this could threaten the financial viability of the Games. They agree that there must be a balance, however, as an entity that is not funded through the government, but through domestic sponsors and the IOC's TOP programmes, such sponsors require strong protection. Their legal head, Sarah Friend, argued that "...we have no problems with creative advertising - but well thought-out attempts to ride on the back, and goodwill, of an event can be potentially damaging to sponsorship agreements..." and "...therefore we need to protect the rights that partners receive for backing Team GB..."¹⁹⁶ Ms Friend, is quite correct in arguing that the sponsors must be protected. Stone agrees and comments that the London Act is a 'realistic and proportionate response' to the increasing problem of ambush marketing.¹⁹⁷

¹⁹³ P Dore, 'Let the Games Begin' I.S.L.R. 2006 pg44

¹⁹⁴ Darren Davidson, 'Does 2012 need anti ambush laws?', Campaign UK, 0008239, 3/3/2006

¹⁹⁵ Bill Watson, Protecting sport sponsors from Ambush, BBC News, January 2006.

<http://news.bbc.co.uk/1/hi/business/4719368.stm> accessed 01 March 2011

¹⁹⁶ Bill Watson, Protecting sport sponsors from Ambush, BBC News, January 2006.

<http://news.bbc.co.uk/1/hi/business/4719368.stm> accessed 28 January 11

¹⁹⁷ D Stone, 'Opinion: The Olympic Games cannot survive without sponsors and those sponsors need legal protection' The Lawyer, 16th January 2006

However, the view that 'we have no problems with creative advertising' seems to be an understatement. If this were the case, it is submitted that surely there would be no need to implement an Act of Parliament that actively seeks to prohibit the use of what can only be described as 'everyday' phrases to be used in the Summer of 2012, not to mention the fact that ambush marketing would be perfectly ethical. Pauline Dore agrees with this, she argues that it is difficult to justify the need for a list of prohibited expressions in addition to the London Olympic Association Right and the IOC/BOA's various trademark registrations. She goes on to argue that these rights would protect most cases of ambush marketing in any event.¹⁹⁸

The IPA's Palomba rebuffed the justification by the BOA that the legislation was required to raise the staging of the Games. "The argument that if these laws are not introduced there will not be enough revenue and therefore the Games will be a failure is simply bullying," she says. "People are scrambling for sponsorship."¹⁹⁹ However, it is submitted that if these laws were not proposed, then sponsorship would never have been 'scrambled for' as Palomba argues. There is a strong element of truth and fact in the justifications for the implementation of such laws. Especially when one looks back to the damage that Nike caused during the 1996 Olympics. These sponsors require exclusivity, an idea offered to would be-sponsors during the 1980's where the Olympics Games were on the verge of collapse. Therefore sympathy can be granted with the IOC for needing to protect their investments as a matter of urgency.²⁰⁰

The LOCOG have reassured advertisers that it will take a pragmatic approach when dealing with enforcement and only focus on those who seek to take advantage of the Olympic brand by 'layering' its elements. Unfortunately, such an assurance is not written into the legislation, and thus does not provide any certainty that their advertising will not infringe.²⁰¹

After assessing the Act, it is clear that there are some contrasting issues from both perspectives mentioned at the beginning of the chapter. The main components of the Act have been described as overly restrictive, draconian and against free commercial speech. On

¹⁹⁸ P Dore, 'Let the Games Begin' I.S.L.R. 2006 pg44

¹⁹⁹ M Byrne, 'Opposing sides set for battle as the Olympics Bill hits the House of Lords', *The Lawyer* 30th January 2006, pg 14

²⁰⁰ N Burton and S Chadwick, 'Ambush Marketing in Sport: An Analysis of Sponsorship Protection and Counter Ambush Measures', *Journal of Sponsoship* 2010 2(4), 305

²⁰¹ London 2012: Not the golden opportunity advertisers were hoping for?

<<http://www.speechlys.com/file.axd?pointerid=a5651c1bbe8347e78f30aa7a127a1c76&versionid=64f406c602c54255b5cf9f8bf66c92cd>> accessed 28 January 11

the other hand, the BOA, amongst other academics, view the Act as a proportionate response in addressing the issues caused by ambush marketing in a bid to protect their sponsors. Furthermore they question free advertising in the vicinity of the stadium and argue whether it is fair that such corporations can freely advertise, and in the process undermine the huge sponsorship fees paid by the sponsors, not to mention question the integrity of the Games?²⁰²

The freedom of speech argument does have some substance because freedom of speech and expression is amongst one of the most important rights present in constitutions across the world today.²⁰³ For example, in the UK the right to freely express is enshrined by the European Convention on Human Rights and is stipulated in the Human Rights Act 1998. ‘Commercial advertisements’ can be described as a freedom that can be ‘guaranteed’ under the ECHR.²⁰⁴ This is because in any democratic economy, there must be a free flow of commercial information and the public have a right to be educated by the information disseminated through advertisements.²⁰⁵ It can even be further argued that the economic system in a democracy would be handicapped without there being ‘free commercial speech’. Thus, by enacting legislation that seems to apprehend local businesses and advertisers from utilising certain words and phrases can obstruct their freedoms. On the other hand, organisers will argue that the Act does not hinder their freedoms because there is no blanket ban on the use of the expressions and as long as one does not attempt to create a link with the Olympics, then they would not fall foul of the Act.

Similarly, there are arguments that describe the provisions of the Act as draconian, because there was no need to adopt such a stern policy in terms of protecting the Olympics.²⁰⁶ This can be further evidenced by the fact the previous hosts did not adopt such strict policies.²⁰⁷ Again, on the other hand, anti-ambush marketers would argue that the phenomenon is ever evolving and more stringent legislation is required to ensure that the sponsors are fully protected.

²⁰² J Reynolds, ‘Let the Games Clamp Down’, Source unknown, 12th January 2011, accessed at Lexis Nexis 11/03/11

²⁰³ D Cran and S Griffiths, ‘Ambush Marketing: Unsporting behaviour or fair play? Ent. L.R 2010, pp297

²⁰⁴ AG Scaria, *Ambush Marketing: A game within a game*, (Oxford University Press, New Delhi, 2008) pg 111

²⁰⁵ *Ibid*

²⁰⁶ H Pearson, ‘Sport: Sepp Blatter plays game of follow the lederhosen’, The Guardian, March 11th 2011, <<http://www.guardian.co.uk/football/blog/2011/mar/11/sepp-blatter-fifa-harry-pearson?INTCMP=SRCH>> accessed 11 March 11

²⁰⁷ N Hicket *et al*, ‘How to avoid an IP ambush’, *Managing Intellectual Property*, 190, June 2009 pp12

Finally, the metaphoric question of ‘balance’ is one that is regularly asked. The question is whether strict anti-ambush laws introduced at major sporting events strike the correct balance between protecting corporate interests and safeguarding freedom of commercial expression? Furthermore, does sporting regulators, such as the IOC and FIFA, exercise too much control over national law makers and authorities by placing an obligation on them to pass exceedingly stringent laws?²⁰⁸

The evidence above seems to provide us with opposing views from both ends of the spectrum. The criticisms from both perspectives seem to be anti-ambush marketing with a thirst for anti-ambush legislation or pro-advertising with a view that anti-ambush legislation is too stern. It is perfectly possible to be anti-ambush marketing and allow creative advertisers to prosper during the games, similarly, it is possible for advertisers to advertise during the games as long as they do not breach any Olympic Intellectual Property and ambush any of the official sponsors. It is therefore proposed that ambush marketing should be a challenge for those who would like a presence at an event.²⁰⁹ If they are willing to associate themselves and ‘free ride’ upon the goodwill of the Olympics, then the Act is a proportionate response to the problem and stern legislation must be utilised. More interestingly, the Act makes no attempt to outlaw ambush marketing per se, it merely strives to protect the Olympics by prohibiting businesses from capitalising on the goodwill attached to the Games, by making it harder to associate with the Olympics. By not outlawing the phenomenon, this positively seems to indicate that the legislation is a reasonable response, that it is specifically designed to satisfy the Olympic charter, yet provides a small glimmer of hope that non-sponsors could have a presence at the Games.²¹⁰

The Act is undoubtedly unique in how far it goes to stop ambush marketing; that said it is but a mere fragile barrier for creative advertisers and ambush marketers. For example, should a business discover a method that creates a link with the Games, without impeding any of the components of the Act then such an accomplishment would not be illegal, but merely ‘unethical’ or even ‘good business practice’.²¹¹ It would undoubtedly generate more complaining from the sponsors for even more stringent legislation in future Games. Unfortunately for the sponsors, it would be rather difficult to see exactly how the Act could

²⁰⁸ D Cran and S Griffiths, ‘Ambush Marketing: Unsporting behaviour or fair play? Ent. L.R 2010, pp293

²⁰⁹ Darren Davidson, ‘Does 2012 need anti ambush laws?’, Campaign UK, 0008239, 3/3/2006

²¹⁰ N Hickett *et al*, ‘How to avoid an IP ambush’, *Managing Intellectual Property*, 190, June 2009 pp12

²¹¹ L Pitt *et al*, ‘Event Sponsorship and Ambush Marketing: Lessons from the Beijing Olympics’ *Business Horizons*, 2010, pp284

possibly get stricter without attracting severe criticism. The only possible methods would be to outlaw ambush marketing completely or reverse the presumption of guilt or even extend the listed expressions.²¹² Although within legislative competence that this could happen, more austere legislation would probably go beyond the perimeter of a proportionate response and become a disproportionate one. The Olympics does not have to be a ‘David and Goliath’ situation where the large company holds sponsorship rights and the smaller business that cannot afford to pay the £40 million fee attempts to gain some sort of coverage during the event. It is important to keep in mind that the Olympics is a global event and residents of host countries cannot be expected to lie down and let the sponsors and the event organisers reap all the benefits.²¹³ It is imperative that sponsors initially utilise all the resources available to promote themselves as sponsors, thus reducing the chance of consumer confusion because if they do leave any gaps, then it is only fair that another will come in and take advantage as long as they stay with the ‘legislative tolerances of the law’.²¹⁴

Where should the legislative line should be drawn? It is arguable that the pendulum is clearly swinging in favour of the event organisers. That said it is clear that LOCOG will take no action against persons who utilise the listed expressions without creating an association with the games, the presumption of guilt was not reversed and the courts are under no duty to take into account any of the listed expressions.²¹⁵ All these ‘relaxations’, in what has been described as an imbalanced and stringent law seems to effectively protect the Games and at the same time allows the advertising industry to continue as normal.

In terms of balance, it is arguable that the perfect balance may have been achieved on this occasion, as the phenomenon has not been outlawed, the Act is unambiguous and there are certain defences available, albeit not as wide as previous legislation.²¹⁶ If LOCOG were to get in touch, then good negotiation skills may be enough to convince them that an association has not been made, especially if the case of ‘Little Chef’ is taken into account. Additionally,

²¹² D Govender, ‘Bringing New Laws into Play’, Legal Week, May 2010

²¹³ Anon, ‘Ambush Marketing will go on despite arrests’, Derby Evening Telegraph, 20th July 2010

²¹⁴ L Pitt et al, ‘Event Sponsorship and Ambush Marketing: Lessons from the Beijing Olympics’ Business Horizons, 2010, pp283

²¹⁵ Lords Hansard text for 11th January 2006, Column 252 (60111-22)

http://www.publications.parliament.uk/pa/ld200506/ldhansrd/vo060215/text/60215-31.htm#60215-31_head1
accessed 03 March 2011

²¹⁶ S. Mckelvey and John Grady, ‘Sponsorship Program Protection Strategies for Special Sporting Events: Are Event organizers Outmanoeuvring ambush Marketers’, Journal of Sport Management, 2008, pp 578

the fact that no known cases have come to light where LOCOG have apprehended a business/advertisement after five years of the Act coming into force are encouraging signs.²¹⁷

Overall, it is reasonable to argue that the London Act is an excellent response to the problem of ambush marketing. This is because it strikes the right balance in the sense that it aims to keep the official sponsors happy whilst simultaneously refraining from outlawing ambush marketing, thus keeping advertisement opportunities open for creative advertisers.²¹⁸ It is designed to alleviate the threat posed by prudent ambush marketers who are inventive enough to circumvent Intellectual Property laws and create an association through expressions and phrases.²¹⁹ The Act, upon closer inspection, is evidently not as stringent as initially argued as LOCOG are happy to take a relaxed view on the listed expressions, and the lack of public cases five years after the enactment of the legislation speaks volumes. Finally, the event organisers are always going to have a heavy input in the type of anti-ambush legislation. It seems that proposing strict anti-ambush legislation can be one of the factors that can help secure the staging of the Games, and there will always be such a monopoly when it comes to staging such events.²²⁰ However, the Act has had a positive response from the Brazilian Olympic authority, that for the Games in 2016, are also making provisions to create a category of listed expressions which they will utilise in the same manner as LOCOG have proposed to do. This is often referred to as ‘horizontal creep’, where a review of the previous edition of the Games leads subsequent Games organisers to adopt a similar, ‘...though incrementally more extensive, legislative palette...’²²¹ The recurrence of ambush marketing at the Olympics has ensured that the protections afforded to one organising committee are used as a justification for the enactment of similar legislation at subsequent Games.²²² This is concrete evidence of the Act having a positive effect on other legislators around the world, who deem the phenomenon as a problem.²²³

Assessing the criticisms above and after evaluating the components of the Act, it seems as if local businesses may not be forced to ignore the event and pretend that the Olympics is not

²¹⁷ N Hicket *et al*, ‘How to avoid an IP ambush’, *Managing Intellectual Property*, 190, June 2009 pp12

²¹⁸ J Grady *et al*, ‘From Beijing 2008 to London 2012: Examining Event-Specific Olympic Legislation vis-a-vis the Rights and Interests of Stakeholders’ *Journal of Sponsorship*, February 2010 3(2) 149

²¹⁹ S Temkin, ‘Brazil can learn from SAs Cup book’, *Business Day* (South Africa) (Law Review Edition), 11th October 2010. Accessed at Lexis Nexis.

²²⁰ D Cran and S Griffiths, ‘Ambush Marketing: Unsporting behaviour or fair play? Ent. L.R 2010, pp293

²²¹ Mark James and Guy Osborn, *London 2012 and the Impact of the UK’s Olympic and Paralympic Legislation: Protecting Commerce or Preserving Culture?*, (2011) 74(3) 410, 426

²²² P. Johnson, ‘Look out! Its an ambush!’ (2008) *ISLR* 24, 24.

²²³ T Campello and L Lima, ‘In the times of World Cup and Olympic Games, Mondaq delivered by Newstex, 17th January 2011, accessed at Lexis Nexis on 11/03/2011

happening, despite numerous academic arguments to the contrary.²²⁴ Intellectual Property experts agree that the restrictions placed on advertising up and until after the Games are warranted. Joel Smith, an Intellectual Property partner at Herbert Smith, a law firm, describes the controls as "draconian", but concedes they are necessary to protect official sponsors' investment.²²⁵ Furthermore, Sarah Wright, an Intellectual Property solicitor at Olswang, suggested that LOCOG had to cast its net wide if it were to guard against ingenious new ambush tactics that advertisers may have devised by 2012. It must be remembered that the government has promised a proportionate and controlled approach when using the Act, and there will be no 'blanket ban' on the listed expressions, a fact that was confirmed by the House of Lords.²²⁶

In terms of potential reforms to the Act, one may suggest that some minor revisions to the Act would effectively improve the legislation, and increase the balance perspective.²²⁷ Such recommendations include adding the section "intention to create a false and misleading association" and characterising "unfair association from "mere reference".²²⁸ It is submitted that such inclusions within the Act would have probably alleviated some of the criticisms whilst at the same keeping stringency of the Act intact. The reason that such an addition would have been welcomed is because the sections would have given the advertising industry an assurance of LOCOG's attitude towards association. This is especially true after recent media criticisms, and additionally, as the relevant authorities have promised a reasoned response when enforcing the listed expressions. Such an addition would have given non-sponsors that all-important 'piece of mind' whilst concurrently, not have made a significant difference to LOCOG and their intentions.²²⁹

To many, it may seem ironic that by winning the right to host the Olympic Games would bring forth an opportunity for the host nation to profit, especially from the travel and tourism industry. The government itself had proposed that the tourism industry should utilise the

²²⁴ Darren Davidson, 'Does 2012 need anti ambush laws?', Campaign UK, 0008239, 3/3/2006

²²⁵ C Mariner, 'Advertisers cry foul over Ambush law', The Guardian, August 2005, <<http://www.guardian.co.uk/business/2005/aug/26/Olympics2012.politics>> accessed 31 January 2011

²²⁶ Lords Hansard text for 11th January 2006, Column 252 (60111-22) <http://www.publications.parliament.uk/pa/ld200506/ldhansrd/vo060215/text/60215-31.htm#60215-31_head1> accessed 03 March 2011

²²⁷ J Grady et al, 'From Beijing 2008 to London 2012: Examining Event-Specific Olympic Legislation vis-a-vis the Rights and Interests of Stakeholders' Journal of Sponsorship, February 2010 3(2) 149

²²⁸ N Groom, 'Ambush Marketing/Olympics Bill', (no date) <<http://www.marketinglaw.co.uk/open.asp?A=1281>> accessed 01 March 2011

²²⁹ J Reynolds, 'Let the Games Clamp Down', Source unknown, 12th January 2011, accessed at Lexis Nexis 11/03/11

London Olympics as a catalyst to increase turnover to up to £100 billion.²³⁰ Yet, they wish to place unreasonable restrictions on the use of words such as “London”, “Summer” and “2012”. That said it seems highly unlikely that legal action would be taken against pub landlords for advertising the screening of the Games or the FA advertising the 2012 FA Cup Final in London.²³¹ Clearly, there is a mixed response to the initial passing of the 2006 Act and as the Games get closer, LOCOG may utilise the Act to apprehend would-be perpetrators. The arguments from both perspectives must be taken into account and they must be synthesised their into positive elements; the author has attempted to do this above. The purpose of this thesis is to identify some of the legal implications of ambush marketing and assess whether the London Act is a proportionate response to protect the London Olympic Games. It is arguable that the above information correctly argues that the Act is a proportionate response by the government. However, some of the criticisms mentioned above needs to be addressed to ascertain whether the UK was indeed better off without legislating and simply extending some of the existing Intellectual Property laws. As such, the next chapter will look to assess current trademark law utilised in the UK, and evaluate whether that law is adequate to protecting the Olympics without the London Act.

Conclusion

This chapter attempts to outline whether it would be fair to argue that such a strong approach was required from the legislature when dealing with ambush marketing? The answer to this question is, *prima facie*, ‘Yes’. This is because the low threshold of liability in this Act is clearly more advantageous for the LOCOG, when looking back at recent examples of ambush marketing. The IOC has a duty to protect the sponsors as part of their contractual obligations and this must be demanded. Arguments for a strong approach can be evidenced by the continuous circumvention of the law by astute ambush marketers.²³² Therefore, to not have this Act for the 2012 Games would not have boded well with the IOC. Furthermore, because of the ‘cat and mouse’ nature of ambush marketing, where the Olympics have often represented the mouse, this Act can represent a significant change from that perspective. With the London Olympic Association Right, LOCOG now represents the ‘cat’ and the

²³⁰ J Reynolds, ‘Let the Games Clamp Down’, Source unknown, 12th January 2011, accessed at Lexis Nexis 11/03/11

²³¹ P Dore, ‘Let the Games Begin’ I.S.L.R. 2006 pg44

²³² S. Bhattacharjee & G. Rao, ‘Tackling Ambush Marketing: The Need for Regulation and Analysing the Present Legislative and Contractual Efforts, Sport in Society, Vol9, no 1, January 2006 pp133

ambush marketers the ‘mice’. The nature of the listed expressions will keep ambush marketers at bay.

In terms of categorising whether this is a strong approach, the criticisms of the Act above can exemplify for themselves on such a matter. The criticisms, however, does not mean that such a strong response was not required. This is because most of the criticisms above come by way of the IPA, and other advertising agencies and businesses that rely upon a wide scope of freedom of commercial expression and possibly even ambush marketing.

Counter arguments against the Act seem to indicate that the Olympic sponsors can ‘take-on’ the ambush marketers frontally, without continuously seeking frivolous claims against small businesses that can never challenge them financially.²³³ Furthermore, it is clearly a matter of concern the amount of monopoly the IOC displays over national governments when it comes to hosting the Games. Also, the potential reversal of the presumption of guilt did not bode very well with many advertising parties.

Provisionally, it can be argued that based on the evidence above, the Act is an effective, significant and proportionate response to the question of ambush marketing. This is because the Act seems to do what no other legislation attempts to do, and that is to deal with the phenomenon ‘head-on’. That said, this conclusion clearly is not irrefutable until trademark law and passing off is evaluated, which many critics above argue is an adequate area of law that can protect the Olympic Intellectual Property. The next chapter will seek to evaluate the various elements of trademark law, and compare and contrast those to the London Act. At the end of that chapter, a conclusion should be drawn, in its entirety, whether the London Act is an effective and proportionate response to the problem of ambush marketing.

²³³ Ian Blackshaw, ‘Court kick off’, *European lawyer*, 2010, p13

CHAPTER THREE

The passing of the London Act attracted copious amount of criticism, the most popular being that the UK already had adequate laws that were more than capable of dealing with the threat of ambush marketing. Comments such as ‘...the UK already has sufficient IP laws...’ and ‘...we already have some of the world’s strongest legislation; we just need to extend existing laws...’ were made frequently. This chapter will explore some of the more traditional domestic legislation capable of protecting sporting events against ambush marketing, as well as assessing whether the criticisms that the London Act received can be vindicated. Trademark law according to Johnson,²³⁴ is probably the prime method for preventing ambush marketing in relation to sporting events. However, this does not remain the only area of protection, as a person who does not infringe a trademark can still be restrained by a number of other mechanisms such as passing off. Passing off will also be examined in relation to ambush marketing in the next chapter. Other areas include copyright law and elements of unfair competition; however these areas are beyond the scope of this thesis.

The aim of this chapter is to assess the effectiveness of trademark law and to distinguish it with the London Act. The previous chapter highlighted some of the arguments that showed the effectiveness of the London Act when concerned with ambush marketing. Elements of the Act such as the London Olympic Association Right and control on marketing within the vicinity of the Olympic Stadium are some of the barriers opposing an ambush marketer. This, prima facie, provides the organisers with formidable protection against ambush marketing. The chapter will focus on assessing the benefits and drawbacks of trademark registration and infringement and will also look to evaluate the effectiveness of trademark law, in the context of it being an adequate deterrent, against ambush marketing. The chapter will be fairly descriptive in the early stages and will draw upon the registration and infringement process, and then distinguish the benefits and drawbacks of such processes to the London Act. Following on from the previous chapter, this discussion will also enable us to consider whether the London Act was a proportionate response against the threat of ambush marketing, in light of any weaknesses of trademark law.

²³⁴ Phillip Johnson, *Ambush Marketing: A Practical Guide to Protecting the Brand of a Sporting Event*, (Sweet and Maxwell London, 2008),

Often referred to as the greatest sporting event on earth, the Olympic brand is one of the most recognised and sought after in the world.²³⁵ As such, it has been registered as a Community trademark in every category of goods and services.²³⁶ It is unsurprising that businesses queue up to associate themselves with the Olympic brand, especially when coupled with an estimated worldwide audience of 4.7 billion spectators in over 220 countries, it seems like a marketing prospect that is too good to overlook.²³⁷ A trademark has been defined as a badge of origin, and can also act as an indication of endorsement.²³⁸ Under section one of the Trademarks Act 1994, a trademark is defined as,

‘any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings. Such a mark may consist of words (including personal names), designs, letters, numerals or the shape of goods or their packaging’²³⁹

It can be argued that the definition of a trademark in itself may be inadequate in the context of ambush marketing. The definition talks of ‘...signs capable of being represented graphically to distinguish goods and services...’ and it is clear from chapter one that prudent ambush techniques never look to utilise registered trademarks in their campaigns. This is because they are aware of the legislation and will look to circumvent any legal action.²⁴⁰ The ones who tend to use trademarks are those who operate close to the borders of the law i.e. selling counterfeit Olympic merchandise on a stall.²⁴¹

It is possible for an event organiser to register any sign, which can be graphically represented as a trademark,²⁴² provided that the sign is clear and suitable.²⁴³ The organisers of sporting events usually wish to register trademarks because they want to enable other licensees to

²³⁵ <<http://www.olympic.org/en/content/The-IOC/Sponsoring/Sponsorship/?Tab=0>> accessed 19 July 2010

²³⁶ P Dore, ‘Olympics Prompt: Ambush Marketing Clampdown’, (jan-dec, 2005/06), Bus. Source Prem page 4

²³⁷ <<http://www.sportbusiness.com/news/167799/olympic-audience-hits-4-7-billion>>

²³⁸ Hector MacQueen *et al*, ‘*Contemporary Intellectual Property: Law and Policy*’ (Oxford University Press, Oxford 2008) page 543

²³⁹ TMA, s.1(1). Under the Community Trademarks regulation, the definition is very similar ‘a community trademark may consist of any sign capable of being represented graphically, particularly words, including personal names, designs, letters numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings’. CTMR, Art 4

²⁴⁰ S. Bhattacharjee & G. Rao, ‘Tackling Ambush Marketing: The Need for Regulation and Analysing the Present Legislative and Contractual Efforts, Sport in Society, Vol9, no 1, January 2006 pp133

²⁴¹ Phillip Johnson, ‘Ambush Marketing: A Practical Guide to Protecting the Brand of a Sporting Event’, Sweet & Maxwell London, 2008 pg 7

²⁴² See Section 1(1) of the Trademarks Act 1994

²⁴³ Amongst others such as precise, self-contained, easily accessible, intelligible, durable, unequivocal and objective. See Case C-273/00 *Sieckmann v Deutsches Patent – und Markenamt* [2003] E.T.M.R 37 at page 46

utilise the mark and also, they may wish to provide branded goods themselves.²⁴⁴ Therefore, organisers of sporting events tend to apply for trademarks that may be of commercial benefit to both official sponsors and ambush marketers. This way, official association can be authorised by the event governing body in question or alternatively, infringement action can be taken against those who have not received such authorisation of association.

A somewhat minor problem of trademark law, posed by Johnson, in the context of ambush marketing can be immediately highlighted. International events, such as the Olympic Games are rarely conducted by the governing bodies, but instead by the local organising committee, i.e. LOCOG. The IOC directly own trademarks that relate directly to the competition itself, such as 'THE OLYMPICS';²⁴⁵ whereas trademarks relating to a particular event and its location such as 'LONDON 2012'²⁴⁶ will be owned by the local organising committee. This twofold approach of the ownership of trademarks suggests that enforcement of trademarks can be a complex issue as a potential ambush marketer or an infringer, is likely to infringe both trademarks at the same time. The question that arises is who should tackle the infringers? Should it be the local organising committee or the international federation? Johnson argues that the local organising committees should deal with infringement by local traders in terms of counterfeit goods.²⁴⁷ However, such committees cannot be expected to deal with marketing campaigns implemented by large multinational business organisations. For example, if a Chinese business organisation ambushes the London Olympics in a marketing campaign, then the LOCOG could not be expected to address it. Instead, it should be left to the IOC or the Chinese national body. The crux of this point indicates that any delay in commencing infringement proceedings can be of significant value to an ambush marketer, especially as they will be capitalising on the interest surrounding the Olympic Games. It seems apparent that if the example above were to occur, there could be some delay as to which committee should challenge the ambush marketer.²⁴⁸ The fact that there is a possibility of two parties whom are able to initiate legal proceedings under trademark law is disadvantageous. This issue of 'who should commence action?' would not occur under the London Act. This is because LOCOG can instigate legal proceedings against any parties whom are seen to contravene any of the aspects of the Act. This is because they are licensed

²⁴⁴ Phillip Johnson, *Ambush Marketing: A Practical Guide to Protecting the Brand of a Sporting Event*, (Sweet and Maxwell London, 2008), page 15

²⁴⁵ THE OLYMPICS (CTM No2827632) is owned by the IOC

²⁴⁶ UK Nos 2359105 and 2368521. Although the CTM is owned by the IOC CTM No3422921

²⁴⁷ Phillip Johnson, *Ambush Marketing: A Practical Guide to Protecting the Brand of a Sporting Event*, (Sweet and Maxwell London, 2008), page17

²⁴⁸ TMA, s.31/CTMR Art.22 see para.9-03

to utilise Olympic Intellectual Property and therefore do not have to rely upon confirmation from the IOC. Actions by LOCOG will be brought about swiftly against any party, in the UK, who seeks to create a false association with the Games.

Major issues with trademark legislation

Further problems with trademark law in the context of ambush marketing can be seen in the objections process. Once an application to register a trademark has been made, there are numerous potential objections that might have to be overcome before it can be officially registered. Once registered, the objections may continue to arise during invalidity proceedings.²⁴⁹ These are divided into absolute grounds for refusal and relative grounds for refusal. A meticulous discussion of each of the absolute grounds for refusal is beyond the scope of this thesis; however, a number do merit exploration: where a mark is devoid of any distinctive character²⁵⁰ and where it is descriptive.²⁵¹ Discussions of the two grounds mentioned will perhaps clarify why trademark law is inadequate in the context of ambush marketing.

Distinctiveness is a vital concept in the law of trademarks. For a mark to be registerable, it must reach a certain threshold of distinctiveness that can be achieved by the nature of the mark itself, or by use having turned it into one relied upon by the public, or a combination of the two.²⁵² The blue, yellow, black, green and red rings of the Olympic symbol are highly distinctive, and as mentioned is a protected trademark in all areas of goods and services. This exclusion is to prevent the registration of a mark that is unable to properly fulfil its essential purpose, i.e. distinguishing the goods or services of one undertaking from another. An example of a problem ensuing from trademarks which were descriptive or lacked distinctiveness were apparent in the lead up to the Football World Cup in Germany in 2006. These marks were, as most title marks are, the grouping of two uncomplicated elements. It is evident that each element itself would always lack satisfactory distinctiveness, but when coupled together, may not lack distinctiveness.²⁵³ The German courts cancelled the registration of FUSSBALL WM 2006 because it lacked the sufficient amount of distinctiveness, after it was challenged as being objectionable. It was suggested that the

²⁴⁹ TMA, s.47

²⁵⁰ TMA, s.3(1)(b)

²⁵¹ TMA, s.3(1)(c)

²⁵² TMA, s3(1)(b)

²⁵³ C Rutz, 'Germany: trademarks – Football World Cup 2006 merchandising' 2007 E.I.P.R page N63

addition of the word 'FIFA' in itself might have made the mark more distinct.²⁵⁴ The addition of a number to a word can also make something distinctive which was otherwise lacking, and evidence of this has been shown in countries such as the UK where 'LONDON 2012' has been used for the Olympic Games.²⁵⁵

The issue of distinctiveness clearly highlights some of the concerns that both events holders and sponsors alike could potentially encounter. Any objections raised, can harm their chances of protecting their investments and controlling all merchandising activities to prevent any ambush marketing. UK trademark law will ensure that event organisers and sponsors cannot register marks that are not distinct and do not comply effectively with the act. A representative example of this would be the application by the BOA to register the mark '2012'.²⁵⁶ The mark was pending for a number of months and such a trademark, in theory, would have given unprecedented powers to the BOA to apprehend anybody who was to utilise the '2012' mark in relation to their products or services. Registration of the mark was denied by the UK Intellectual Property Office, due to its lack of distinctiveness, in accordance with section 3 of the Act. Tarling argued the fact that the application had been abandoned was a reassuring concept. By taking a similar stance of the German court, as mentioned above, this rejection was quite clear in the sense that there are limits to even what large corporations could register. Even their applications are subjected to Intellectual Property laws.²⁵⁷ Looking at this example in the context of the London Act, '2012' is amongst the listed expressions as part of the London Olympic Association Right. Furthermore, by examining the listed expressions, every single listed expression can be deemed to be non-distinctive. One can argue that words such as 2012, London, Summer, Twenty-Two and so on are all non-distinctive, yet are protected under the right.²⁵⁸ These non-distinctive phrases demonstrate that the London Act does what trademark law cannot: it has the authority to protect phrases that are not distinctive. Thus, the issue of distinctiveness is clearly an obstacle for event organisers under trademark law, but as it seems, not for the London Act. Furthermore, the above example of the BOA's failure to register the '2012' mark clearly renders the London Act more beneficial for the organisers and sponsors than

²⁵⁴ *ibid*

²⁵⁵ TM no 2359105

²⁵⁶ P Dore, 'Olympics Prompt: Ambush Marketing Clampdown', (jan-dec, 2005/06), Bus. Source Prem page 4

²⁵⁷ James Tarling, London Olympic Committee loses 2012 trademark, steels law Solicitors, June 2009
<<http://www.steeleslaw.co.uk/news-item.aspx?id=18fc07d6-a362-4aa6-9834-a39be5e8ce3d>> accessed 01 February 2011

²⁵⁸ P Sheridan, 'An Olympic Solution to Ambush Marketing: How the London Olympics show the way to more effective Trademark Law', Sports Lawyers Journal 2010, 17(27) pg

trademark law. The listed terms can be added in by the Secretary of State, through parliament, upon consultation with the various advertising agencies.²⁵⁹ As such, there is no need to register any of the expressions, as would with trademark application, hence providing instant and broad protection against ambush tactics.

In addition, it is necessary to address whether a mark is descriptive of the goods and services for which the mark was registered.²⁶⁰ For example, it would not be permissible to register the trademark JAVELIN for javelins, but it is for pineapples.²⁶¹ Such objection is required because it is intended to protect the public, so that other traders may utilise a mark.²⁶² This area of trademark law is designed to ensure the public are protected, however, it could also allow ambush marketers to potentially take advantage of this area. It is here where another disadvantage of trademark law can be seen. If a mark is objectionable for want of descriptiveness, this means that an ambush marketer could potentially organise their own marketing campaign using such phrases.²⁶³ Again, when comparing this to the London Act, it is arguable that every expression cited under the London Olympic Association Right is a complete contradiction of section 3(1) of the Trademark Act. For example whilst it would not be permissible to register '2012' for 2012 or 'LONDON' for London under section 3 of the Trademark Act, the listed expressions, cited under the London Act, does exactly that and are purely descriptive. The London Olympic Association Right requires the two expressions to be used before an infringement can be claimed. However, in a method of dealing with this issue, infringement proceedings under the London Act can be brought against any party who seeks to create an unauthorised association with the Games whether they have used the listed expressions or not. Taking ambush marketing out of the equation, section 3 of the Act would be the perfect section or the 'correct law' for local business owners, as it prohibits wealthy organisers and sponsors from exercising a huge degree of control on words and phrases that are not distinctive or are merely descriptive. However, for the purposes of ambush marketing, it also shows how section 3 is a clear weakness of the Act, and is clearly detrimental to event organisers. Furthermore, it is clear that most, if not all, of the expressions mentioned in schedule 4 of LOAR would all be objectionable under section 3(1) of the Trademark Act 1994. Again, this demonstrates the advantageous elements of the London Act because

²⁵⁹ LOGPGA sec 19(1)

²⁶⁰ TMA, s.3(1)(c)

²⁶¹ O2 Holdings Ltd v Hutchinson 3G Ltd [2006] EWHC 534 (Ch) per Lewison J

²⁶² Case C-329/02 *SAT.1* [2004] E.C.R. I-8317; [2005] E.T.M.R. 20 at 25

²⁶³ Phillip Johnson, *Ambush Marketing: A Practical Guide to Protecting the Brand of a Sporting Event*, (Sweet and Maxwell London, 2008), page 24

phrases that are expected to fall foul of the trademark Act, seem to pose no problems for the London Act. Expressions can be added and removed when necessary. The organisers cannot be expected to rely upon law that makes it difficult to protect the Olympics and will no doubt find the London Act more beneficial. Additionally, it shows that the London Act was a proportional response to ambush marketing.

To conclude, it is clear that section 3 of the Trademarks Act presents a clear weakness in the context of ambush marketing. It seems no coincidence that the advertising industry is against the passing of the London Act and thoroughly supported the notion of trademark law being adequate. If the organisers cannot adequately protect the event against ambush marketing, then London may never have had the opportunity to host the Games. The listed expressions, although harsh, would never have made it successfully past the objections process of the Trademark Act. The BOA's failure to register '2012' is evidence of the Act's drawbacks in relation to ambush marketing.

Infringement

The discussion above related to some of the potential issues that event holders and sponsors alike would face in relation to the application and registration of trademarks. In this section, the concept of trademark infringement will be explored, alongside attempting to ascertain how effectively an event organiser/sponsor will be able to assert their rights against ambush marketers.

A proprietor gains the right to exclusively use a mark that has been successfully registered. Such an exclusive right is classified negatively by rules that lay out what acts others cannot. To amount to trademark infringement, a person simply has to commit any of these 'acts' without the consent of the proprietor. For example, using the registered mark, without consent, in an advertising campaign. The principal rationale behind such rules is to ensure that the proprietor's or registered mark's 'guarantee of origin' is upheld.²⁶⁴ The 'guarantee' is an opportunity to ensure the members of public that the mark is seen in relation to goods or services, the public can be certain that goods or services come from the registered proprietor or his affiliates.

²⁶⁴ R Jacob *et al*, 'A Guidebook to Intellectual Property: Patents, Trademarks, Copyrights and designs', (5th edition, Sweet and Maxwell London 2004) page 82

The use of a trademark is also infringing only when it has been used within the course of trade.²⁶⁵ Therefore, any infringement must be in the context of a commercial activity with view to an economic advantage, and not as a private matter.²⁶⁶ It is arguable that selling merchandise, as well as giving it away for promotional intentions is done with an outlook towards economic gain, and so is done in the course of trade.²⁶⁷ With regards to ambush marketing, this is extremely important especially in relation to multinational business organisations. They are likely to have large marketing campaigns where they will provide free merchandise for promotional purposes, and because of the provision above, they will refrain from utilising any registered trademarks in their campaigns, as the proprietor may be in a position to challenge such an infringement. The obvious downside to this is that if the ambush marketer abstains from using any registered trademarks in their campaign, free promotional merchandise can go unpunished. For example, at the 1996 Olympics, Nike distributed free flags amongst other merchandise to spectators. Unfortunately for the Atlanta Organising Committee, there was no infringement of any trademarks. When comparing with the London Act, infringement of the Act is not exhaustive of the listed expressions, as a trademark is to a registered mark. They are designed for the court to take into account any claims brought forward by the organiser. For a person to be apprehended under the London Act, a listed expression need not be utilised as only a mere association with the event is required for LOCOG to take action. Again, this demonstrates the two types of infringements on offer from these statutes. One requires an actual infringement of a mark and the other requires a mere unauthorised association with the event for proceedings to be instigated. It is quite clear on this occasion, which one is the more beneficial in the context of ambush marketing.

Remedies

²⁶⁵ TMA, s.103(1) – trade includes any business or profession

²⁶⁶ Case C-206/01 Arsenal Football Club Plc v Reed [2002] E.C.R. I-10273 It was held that the use of the trademark in the course of trade, whilst it does not serve to indicate origin, may harm the trademark's use by its proprietor as a guarantee of origin. Mr Reed was arguing that he sold *unofficial* items of merchandise, which had been done so for 30 years and was not being used as a trade of origin but more so as a badge of *allegiance*. Nonetheless, Mr Reed was liable to jeopardise the guarantee of origin of Arsenal's trademarks and this was a finding of fact which was inevitable in the circumstances.

²⁶⁷ Phillip Johnson, *Ambush Marketing: A Practical Guide to Protecting the Brand of a Sporting Event*, (Sweet and Maxwell London, 2008), page 28

By way of remedies, trademark law can use the advantageous interim injunction, which can be especially effective against an ambush marketer. One of the advantages of the remedy is that it can be invoked before a wrongdoing has been carried out and there is not enough time to go to court, or where one does not wish to wait until damage has been done before going to court.²⁶⁸ For example, if LOCOG realise that a business organisation is to use an official Olympic logo within their marketing campaign, then they could secure an injunction before and then take proceedings to court to assess any damages. Injunctions can also be taken out as matter of urgency without notice. For example, if an Olympic logo is utilised during the Games, then the organisers could secure an injunction quickly and urgently and because the injunction would be based upon a pre-existing action in law, then it would be simple to secure, as the merits of the case would be unquestionable if there is a blatant use of a trademark. In respect of the London Act, it may be more difficult to secure an injunction as the court would most likely want to ensure that the application is a meritorious one, a feat easier for trademark law as one either uses a trademark or not. An association with the Olympics under the London Act would be open to interpretation especially if none of the listed expressions were used. In that respect, gaining an instant solution would be easier through trademark law.

How effective is trademark law?

The purpose of this chapter was to deal with the issue of trademark law and its abilities to protect the Olympics from ambush marketing. In a bid to address such criticisms, the elements of trademark infringement and what is required for a successful claim will be studied in some detail. The question that needs to be asked is whether trademark law is an adequate measure that one could utilise to protect a sporting event, in the context of ambush marketing? There are a further two sub-questions that follow. Can the organiser utilise trademark law to assert their rights in the context of ambush marketing? Secondly, should trademark law be utilised to pass all marks and phrases that are of benefit to them, such as London, Olympics, Summer, Gold, Bronze and so on, so ambush marketers cannot use them to intrude upon the Games?²⁶⁹

²⁶⁸ Interim injunctions <<http://www.inbrief.co.uk/civil-court/interim-injunctions.htm>> accessed 01 July 2011

²⁶⁹ P Sheridan, 'An Olympic Solution to Ambush Marketing: How the London Olympics show the way to more effective Trademark Law', Sports Lawyers Journal 2010, 17(27)

In situations where an identical mark is used in relation to similar goods and services, or where a similar mark is used in relation to identical or similar goods and services, then a trademark action will be successful, if the infringement is likely to cause confusion among the public, or if it likely to create an association with the registered trademark.²⁷⁰ There are various cases, that would be of assistance to the courts if a hypothetical case, involving ambush marketing, were present before them.²⁷¹ This is because the courts would take into account all the relevant factors such as the degree of similarity, the distinctiveness and likelihood of confusion.²⁷² An analysis of the above provisions can demonstrate that trademark infringement action could be used successfully for ambush marketing.²⁷³ For example, if the FA is successful in registering the 'FA Cup' as a trademark in respect of certain goods and services, and if someone uses that mark on a class of products for which the FA has registration, then the FA could approach the courts on the grounds of trademark infringement. However, the success of the infringement will depend on the provisions above. In other words, one has to blatantly use a registered mark as a method of commercial gain, which is likely to cause confusion in the eyes of the public as to whom the real owner of the trademark is. This is something that an astute ambush marketer would refrain from doing.²⁷⁴ The problem here, is that because of the specific requirements outlined above that are compulsory for a successful trademark infringement case, it is prudent to argue that trademark law, in general, will only be of benefit to the event holder when it comes to dealing with street traders who are perhaps selling tee shirts from a car boot or a market stall displaying an Olympic logo. Such people are already bordering on the wrong side of the law by selling such merchandise in any case.²⁷⁵

Scaria²⁷⁶ argues that the most important type of trademark infringement in the context of ambush marketing would be via advertisements. Again, it is questionable whether an advertiser would utilise a registered trademark. That said, ambush marketing campaigns are regularly implemented through a number of advertisements. For example, before the

²⁷⁰ TMA s.10(1) Infringement

²⁷¹ L Bean, 'Ambush Marketing: Sports Sponsorship Confusion and the Lanham Act', 1128

²⁷² A Moorman and T Greenwell, 'Consumer attitudes of Deception and the Legality of Ambush Marketing Practices' 196-207

²⁷³ J Strawczynski, 'Is Canada ready for the Vancouver Winter Games?' 2004 62 U Toronto Fac. L. Review 213, 215

²⁷⁴ P Sheridan, 'An Olympic Solution to Ambush Marketing: How the London Olympics show the way to more effective Trademark Law', Sports Lawyers Journal 2010, 17(27) pg 2

²⁷⁵ Phillip Johnson, *Ambush Marketing: A Practical Guide to Protecting the Brand of a Sporting Event*, (Sweet and Maxwell London, 2008), page 16

²⁷⁶ AG Scaria, *Ambush Marketing: A game within a game*, (Oxford University Press, New Delhi, 2008) pg 58

commencement of the World Cup in 2010, Nike released an advertisement of some of their endorsed athletes playing a game of football, and also showing flashes of their future lives in a three minute film. Nike has the fortuity of having some of the finest footballers on their payroll. The Guardian reported that the advertisement had successfully ambushed official sponsors Adidas.²⁷⁷ A study reported that this advert had created an association to the World Cup through an ‘online buzz’ based on blogs, message boards and social networking websites, which superseded that of Adidas and other official sponsors.²⁷⁸ Pete Blackshaw, executive vice-president of digital strategy at Nielsen, stated “...this study shows that compelling, savvy marketing can establish this sort of connection in the eyes of consumers without having to write that expensive sponsorship cheque...” In relation to trademark infringement through the medium of advertisements, what could FIFA possibly do? Absolutely nothing. Nike had made no reference whatsoever in terms of any registered trademarks to the World Cup. The next question poses ‘what made it a World Cup advertisement that intended to ambush?’ Every player in the film was playing in their World Cup jerseys, in what seemed to be World Cup games; this is what ultimately makes it a very successful ambush. Even the uploaded video on the media website YouTube names the video as the ‘Nike – World Cup Commercial’.²⁷⁹ If all advertisements are like the example above, any actions for trademark infringement could prove to be futile. It could even be argued that the London Act would have struggled against such genius marketing. It is therefore submitted that advertisements pose the biggest challenge for the organisers. Furthermore, they may not be able to rely upon trademark law to protect them.

As mentioned frequently, one of the biggest concerns for all major events is that an ambush marketer rarely resorts to utilising registered trademarks for their campaigns. They instead create a false association with the marks through their imaginative means. The best example of this again concerns American Express (Amex) and their slogan ‘...and remember, to visit Spain, you do not require a Visa...’ during the Barcelona Olympics. Analysing the latter, Amex have not used any registered trademarks for their advertisement, but ingeniously, have created a link to the Olympic Games at the expense of, one would assume, Visa.²⁸⁰ If such an advert was released in the lead up to the 2012 Games, based upon the provisions above, there would not be much that trademark law could do. On the other hand, the London Act could

²⁷⁷ Mark Sweeney, ‘World Cup 2010: Nike beats official sponsors for online buzz’ the Guardian, June 2010, <http://www.guardian.co.uk/media/2010/jun/11/world-cup-2010-nike-ad-buzz> accessed 07 July 2010

²⁷⁸ *Ibid*

²⁷⁹ Nike write the future: World Cup 2010 Commercial <http://www.youtube.com/watch?v=ISggaxXUS8k>

²⁸⁰ AG Scaria, *Ambush Marketing: A game within a game*, (Oxford University Press, New Delhi, 2008) pg 62

potentially be utilised to apprehend the ambush marketer, if an association with the Games can be established. This highlights that the London Act is a proportionate response to the threat of ambush marketing.

Johnson opines that trademark law is the primary mechanism when attempting to protect against ambush marketing.²⁸¹ This statement is debatable, due to the drawbacks of trademark law mentioned above. The lack of trademark claims in relation to ambush marketing appearing in the courts suggests that ambush marketers are aware of the laws in relation to trademark infringement and are wise enough to circumvent them. Furthermore, due to the objections procedure, organisers will never be successful with every application, because of the strict protocols on distinctiveness and descriptiveness. The Act is designed to provide fairness in terms of Intellectual Property, and it is perhaps this that renders the Act inadequate in the context of ambush marketing. Its quest to provide fairness to the public is clearly detrimental to the organisers as their applications to protect specific events may fall foul of the objections section. If a trademark has been utilised without authorisation, then perhaps there would be no better option than to seek redress under trademark law. However, for the current ambush techniques used by marketers, UK trademark law would be an ineffective weapon when attempting to defend the rights of the organisers. This view is supported by Scaria who argues that trademark law will be of little or no aid in most of the common and subtle ambush marketing practices, such as buying commercial time during the telecast of events,²⁸² making independent contracts with individual athletes,²⁸³ buying advertising boards in and around the event location, making people carry products containing the ambusher's mark or asking them to wear certain clothing with their logo to the stadium. Scaria argues that ineffectiveness against these major forms of ambush marketing makes trademark infringement actions futile to a great extent.²⁸⁴ It is also submitted that the prudence of most ambush marketers in ensuring that trademarks are not deliberately infringed also adds weight to Scaria's argument, because rather than be on the wrong side of the law, they are happy to create ingenious methods to create that all elusive link with the Olympics. This seems to signify that a more robust attempt at protecting the sponsors is justifiable. Hence, the London Act is a proportionate response to the threat of ambush marketing.

²⁸¹ Phillip Johnson, *Ambush Marketing: A Practical Guide to Protecting the Brand of a Sporting Event*, (Sweet and Maxwell London, 2008), page 55

²⁸² *Ibid*

²⁸³ *Ibid*

²⁸⁴ AG Scaria, *Ambush Marketing: A game within a game*, (Oxford University Press, New Delhi, 2008) pg 62

Brooks stated when the Bill was going through for the London Act, [in relation to Intellectual Property laws] ‘... what it doesn’t do, is protect against ambush marketing...’ Judging by the evidence provided above, Brooks is absolutely correct. The Act was an absolute necessity when it comes to protecting the sponsors and the Games, and putting the legislation in place was of the utmost importance. Initial reactions to the London Act attracted criticisms such as "grossly extends UK law" and is "far beyond any legislation introduced anywhere in the world".²⁸⁵ Some of this criticism, in relation to some of the listed expressions may be justified. However, until there is concrete evidence of those expressions being enforced by the BOA in terms of unlawful association with the games, it is difficult to see exactly what their intentions are. The government has stated that a common sense approach will be utilised in relation to the London Olympic Association Right. So far, because of the lack of examples, it is fair to argue that seems to be exactly what they are doing.

Sheridan’s argument mirrors that of Scaria and the author. He argues [from a US point of view]... ‘victims of ambush marketing have had little legal recourse against ambush marketers as they are smart enough to avoid using trademarks in their advertising campaigns, which removes the most effective remedy to this problem: Trademark law infringement...’²⁸⁶ This goes to show that similar problems with trademark law are also being faced in the US. One may even go as far arguing that legislators should look to the London Act and find a way of incorporating its anti ambush elements within the trademark Act. Sheridan also suggests in his research that the US should adopt laws mirroring the London Act within their legislation as a method of protecting against ambush marketing.²⁸⁷

Conclusion

To conclude, the above chapter looked to determine the effectiveness of UK trademark law in relation to ambush marketing. It, prima facie, demonstrates that UK trademark law is not ready to protect major sporting events against ambush marketing. It has been argued that the registration and infringement processes clearly present gaps in the legislation, which is detrimental to event organisers. Firstly the descriptive and distinctive areas of trademark law

²⁸⁵ M Byrne, ‘Opposing sides set for battle as the Olympics Bill hits the House of Lords’, *The Lawyer* 30th January 2006, pg 14

²⁸⁶ P Sheridan, ‘An Olympic Solution to Ambush Marketing: How the London Olympics show the way to more effective Trademark Law’, *Sports Lawyers Journal* 2010, 17(27) pg 2

²⁸⁷ *Ibid* at 9

are clearly designed as a filter to stop objectionable and weak trademarks from being registered. Whilst this would be an example of good law making, especially as it attempts to prevent large corporations like the BOA from registering indistinctive trademarks, this inevitably means that ambush marketers can take advantage of this section and create false associations with an event. Furthermore, it does not help the cause when the London Act has a list of expressions that are protected that would never become trademarks in UK law, because they would be merely descriptive and indistinctive. Infringement-wise, should a trademark be used without authorisation, and then infringement under trademark law would be a great method of redress against the perpetrator. Current ambush techniques, especially through advertisement, rarely resort to using a trademarks and this again is problematic for the organisers. Therefore, is the London Act a proportionate response to the threat of ambush marketing? Analysing the discussions above it would have to be argued that it is. Trademark law would clearly be out of its depth against ambush marketing, and would be required to have major amendments, especially to the problematic section three to be capable of effectively deterring ambush marketers. Section 3 has a perfect balance and amendment to this section, which clearly swings the pendulum towards organisers, and allowing them to registering weak trademarks, would have a detrimental impact upon the economy. Thus, amending the Act would be out of the question and would have negative impact on anybody who would wish to register a trademark; it also may not comply with EU regulations. Therefore, it is for these reasons, the London Act is a proportionate response to the threat of ambush marketing. Unlike trademark law, it is specifically designed for the phenomenon. One would just have to imagine the various associations that would be created with the Games if the London Act had never been passed. Furthermore, even specific legislation is not enough to prevent ambush marketing. Beijing in 2008 and Sydney in 2000, despite having specific legislation were still subjected to ambush marketing. Having trademark law as the sole legal base to protect the Games would definitely have swung the pendulum in favour of ambush marketers, potentially compromising all the sponsorship money paid by the sponsors.

The next chapter will look to assess trademark law's counterpart, Passing Off. Having demonstrated trademark law as ineffectual in the context of ambush marketing, passing off would be the next step for many people. The next chapter will analyse the remedy and provide us with a detailed conclusion to see whether the enactment of the London Act was warranted and was an effective and proportionate response to the threat of ambush marketing.

CHAPTER FOUR

The previous chapter studied trademark law and highlighted some of its limitations in the context of ambush marketing. This chapter will endeavour to discuss another area of law that may effectively protect the Olympic Games and its sponsors. The remedy of passing off will now be discussed in light of whether the London Act was a proportionate response to the threat of ambush marketing. This common law remedy aspires to protect the goodwill belonging to a person or corporation, therefore, *prima facie*, is an ideal deterrent against ambush marketing, as the rationale of ambush marketing is to deflect the goodwill of an event onto a non-sponsor. This chapter will commence by discussing the requirements of a successful passing off action in the context of ambush marketing and evaluate any limitations in such requirements. Then there will be an analysis of some of the case law of passing off with regards to the phenomenon, and this should enable the formulation of a conclusion as to whether the remedy is effective against ambush marketing and if the London Act can be a disproportionate response.²⁸⁸

In any passing off claim, there are basic elements that must be satisfied in order for an action to be successful. These are: goodwill attached to a trader's business in the context of goods and services; misrepresentation, leading the customers to believe that goods supplied by one are those of another's; and damage caused as a result.²⁸⁹

Limitations of passing off

The final element of damages is the first limitation. In terms of damages, it must be shown that there is at least some damage to the claimants' goodwill. In any common passing off claim, where traders are competing, damage is an easily satisfied concept, as customer confusion would cause a downfall in revenue. However in relation to sponsorship of sporting events, the traditional type of damages would be more or less irrelevant according to

²⁸⁸ The issue of proportionality is the notion of the London Act going too far in its methods of protecting against ambush marketing, and was such a response required if traditional intellectual property legislation could protect effectively.

²⁸⁹ The Jiff Lemon case, *Reckitt & Coleman Products Ltd v Borden Inc (No3)* [1990] R.P.C. 341 at 499

Johnson.²⁹⁰ Such a simple association with the event would not be sufficient and more tangible evidence would be required.²⁹¹ There have always been problems with passing off cases in relation to sport sponsorship, especially where the association is one of prestige. The limitation here is that false association does not cause any loss in terms of damages or goodwill to the claimant party. Take for example the Olympics; businesses sponsor the Games due to its prestigious nature and that its global appeal is beneficial to the sponsors. An unauthorised business entity is unlikely to cause the IOC a loss in reputation or its goodwill if it uses the Olympic badge.²⁹² If in such a case the claimant cannot prove significant damages, then the claim would indeed be futile. Interestingly, Scaria argues that in such cases of ambush marketing, loss of existing trade and profits would be relatively easy to prove as event organisers can easily prove the loss of sponsorship revenue to ambush marketing.²⁹³ Prima facie, this is the correct method of looking at ambush marketing and it is not disputed that ambush marketing can lead to the loss of future sponsorship revenue. However, one must take into account the possibility of the points mentioned in chapter one about the Olympic organisation never seeing its finances making a loss on market imperfections and ambush marketing because of the magnitude of coverage it attracts.²⁹⁴ In other words, it will be difficult to make a loss as the reluctance of one business entity to pay a certain amount will be another's gain. As such, an event holder may be able to satisfy the first two requirements of passing off, but fail the third should they not be able to show any kind of loss. By going back to the discussion in Chapter two, the London Act requires but mere association with the event for one to be deemed an unauthorised ambush marketer. Having to fulfil three requirements in order to establish ambush marketing, and passing off, is clearly a difficult task for any prospective claimants.

The second limitation of a general passing off claim in relation to ambush marketing is the use of a disclaimer. Some business entities will resort to disclaiming any official link or affiliation with an event. If the disclaimer is prominent, it will be successful.²⁹⁵ For example

²⁹⁰ Phillip Johnson, *Ambush Marketing: A Practical Guide to Protecting the Brand of a Sporting Event*, (Sweet and Maxwell London, 2008), page 57

²⁹¹ See New Zealand RFU, unreported, July 10, 2001. Despite the New Zealand Football Rugby Union could not prove any actual damage within their claim, despite having various intellectual property interests in marks and sponsorship arrangements.

²⁹² *Ibid* at pg 60

²⁹³ AG Scaria, *Ambush Marketing: A game within a game*, (Oxford University Press, New Delhi, 2008) pg71

²⁹⁴ J Schmitz, 'Ambush Marketing: The Off Field Competition at the Olympic Games' *Northwestern Journal of Technology and Intellectual Property*, 3(2) 2005, 208

²⁹⁵ See *Arsenal v Reed* [2001] E.T.M.R 77 disclaimer at [40-41]

in *Arsenal v Reed*, the goods were clearly highlighted as “unofficial”.²⁹⁶ Suggestions made by some ambush marketers that failing to mention an official endorsement was the same as a disclaimer has been rejected.²⁹⁷ Johnson believes that a disclaimer can be a major downfall in the context of ambush marketing as passing of action can be avoided where an effective and prominent disclaimer is displayed.²⁹⁸

Endorsement and passing off

Since *Irvine v Talksport Ltd*,²⁹⁹ it is now possible for one to launch a specific action of passing off on the basis of endorsement. In other words, one can take action if a business entity purports some kind of sponsorship agreement with an endorser, even if they do not share a common field of activity between their relevant trade areas.³⁰⁰ Ambush marketing is all about falsely claiming a sponsorship arrangement with an event.³⁰¹ This development, prima facie, seemed perfect to deal with specific ambush marketing claims. Johnson argues that ‘...now it is possible to recover for improper endorsements, its importance to sporting events has increased significantly...’³⁰² However, once again, it is not without its limitations.³⁰³

Firstly, one must establish that at the time of the relevant act of passing off, the endorser had a significant reputation or goodwill. This would be easily established as most major sporting events have such goodwill in terms of providing sponsorship contracts. Furthermore, the reasons most unauthorised associations are carried out tend to be because of the goodwill attached to a particular endorser. Secondly, the actions of a trader gives rise to a false message, which would be understood by a not insignificant section of the market that the

²⁹⁶ *Ibid*

²⁹⁷ *New Zealand Olympic and Commonwealth Games association Ltd v Telecom New Zealand* [1996] F.S.R. 757 at 761

²⁹⁸ *Ibid* at pg63

²⁹⁹ *Irvine v Talksport Ltd* [2002] FSR 60. In this case Irvine was awarded £25,000 in damages for successfully arguing that Talksport utilised a manipulated picture of him on their brochure. The court also concluded that it was not necessary that there be a common field of activity between the claimant and defendant. This was a requirement of passing off prior to this decision. This was a significant update to passing off in the context of ambush marketing as it removed the common field of activity requirement between an ambush marketer and an event holder.

³⁰⁰ *Irvine* [2002] F.S.R. 60 at [9]

³⁰¹ T. Meenaghan, ‘Point of view: Ambush Marketing: Immoral or imaginative practice?’ (1994) *Journ. Advert. Research*, 77-88, p. 85

³⁰² Phillip Johnson, ‘Ambush Marketing: A Practical Guide to Protecting the Brand of a Sporting Event’, Sweet & Maxwell London, 2008 pg 61

³⁰³ A Michaels, ‘Passing Off by False Endorsement: But what’s the Damage’ *E.I.P.R* [2002] 448 pg 452

trader's goods had been endorsed, recommended or are approved by the endorser.³⁰⁴ This is where the more ingenious types of ambush marketing would be problematic.³⁰⁵ Firstly, categorising consumer confusion can be a difficult objective. Exactly when does consumer confusion take place? Does it occur when released into circulation or after the goods have been bought and used?³⁰⁶ The courts are left to decide this and there is a problem of the courts' approach varying in this respect.³⁰⁷ Secondly, unlike trademark law, if a person alludes to an event utilising logos and emblems, it is unlikely to be taken as being endorsed by an event without any concrete evidence. For example, use of the Olympic logo is wide spread. If an unauthorised body uses a logo, it does not imply that they are sponsoring the event. Finally, and crucially, in the absence of an express claim to sponsorship, this could be deemed as persuasive evidence that no sponsorship is implied.³⁰⁸ This will go for almost every ambush marketer. They will never resort to claiming sponsorship with the event in question. This is done through imaginative means. As such, this second requirement has the means and basis to cause many passing off actions in the context of endorsement, and ambush marketing, to fail.

Damages are very specific in an endorsement-passing off action. If damages are evident, then the defendant will have to pay the market rate of the sponsorship fee to the claimant. Michaels argues that the problem with this is that a business entity can make any false endorsement claim that they want and if it was to get this far in the proceeding, they would simply pay the going rate for Olympic sponsorship.³⁰⁹ For a multinational business organisation, should they get pulled up, will merely have to pay the fees and be done. For a smaller business organisation, they will have a lot more to lose as the going rate for Olympic sponsorship is in the tens of millions.

Relevant case law

The aforementioned points demonstrate some of the limitations of passing off. However, in order to decide whether passing off would be effective in the context of ambush marketing,

³⁰⁴ Irvine [2002] F.S.R. 60 at [46]

³⁰⁵ *Ibid* 13 at pg 62

³⁰⁶ AG Scaria, *Ambush Marketing: A game within a game*, (Oxford University Press, New Delhi, 2008) pg 71

³⁰⁷ *Ibid*.

³⁰⁸ *New Zealand Olympic and Commonwealth Games Association v Telecom New Zealand Ltd* [1996] FSR 757 at 767

³⁰⁹ A Michaels, 'Passing Off by False Endorsement: But what's the Damage' E.I.P.R [2002] 448 pg 452

there would be no better method than analysing some of the case law brought specifically for ambush marketing. Many cases that have come before the courts in the context of ambush marketing are in the form of passing off. The facts of the cases will be briefly considered, as these will include instances of ambush marketing, and the court's ratios will be analysed.

Unfortunately, cases brought before the courts in the UK in relation to ambush marketing are few and far between. Hence, there is only one case worthy of mentioning, which could be attributed to ambush marketing. The case in question is also utilised by Scaria in the context of ambush marketing.³¹⁰ In *Arsenal Football Club v Reed*,³¹¹ the defendant operated a stall where unauthorised Arsenal goods and memorabilia were being sold as "unofficial memorabilia". The claim was a broad allegation which involved the unauthorised sales by the defendant which in turn would mislead members of the public into believing that were the products of Arsenal Football Club, or were goods associated or connected with or licensed products of Arsenal as they bore various insignia and phrases associated with the club. Such a claim could fall under the definition of ambush marketing, and clearly, the claim implies that the defendant was attempting to create a false association.

In deciding the claim, the court outlined that there would be a group of customers who would purchase the Arsenal memorabilia only because it would be of interest to them as signs of allegiance and loyalty.³¹² As such, they will have no interest in knowing who makes or markets these goods. In determining the deception and confusion issue, the courts took into account whether there would be any confusion amongst the part of the public that cares about the origin of such products.³¹³ It also pointed out that the use of the Arsenal signs on the defendant's goods carried no message of trade origin.³¹⁴ Though the courts accepted that some fans might wish to purchase official Arsenal memorabilia, it is non-sequitur to say that all of the Arsenal memorabilia was believed by the customers to have been officially licensed by Arsenal.³¹⁵ Due to these points, Arsenal failed to establish confusion. The courts also decided that they had also failed to show that the defendant's activities had caused them any significant damage.³¹⁶ Therefore, the broad case of passing off had failed. The one and only UK case that contains all the elements of a successful ambush, was found wanting at the

³¹⁰ AG Scaria, *Ambush Marketing: A game within a game*, (Oxford University Press, New Delhi, 2008) pg 72

³¹¹ *Arsenal Football Club v Reed* [2001] RPC 46

³¹² *Ibid* at para 25

³¹³ *Ibid* at para 42

³¹⁴ *Ibid*

³¹⁵ *Ibid*

³¹⁶ *Ibid* at 43

crucial stage. The claimants could not prove that all important element of confusion and resulting damages.³¹⁷

Having just the one UK passing off case that can be attributed to ambush marketing, it does not really give the full picture as to whether this common law remedy is effective enough to protect against ambush marketing. Furthermore, ambush marketing cases, in general, involve a business organisation with marketing prowess as opposed to individually operated stalls. In that respect, it may be worthwhile analysing some cases brought before the courts in other jurisdictions where passing off requirements are very similar to that of the UK.

One of the landmark cases that relates directly to ambush marketing falls under the Canadian jurisdiction of passing off. The case in question is the National Hockey League (NHL) v Pepsi Cola Canada Ltd (Pepsi).³¹⁸ Here, despite Coca-Cola being the official sponsor of the NHL, Pepsi launched an advertising campaign 'Diet Pepsi's \$4,000,000 Pro Hockey Playoff Pool'.³¹⁹ The case was brought forward by the NHL of passing off and what can be described as ambush marketing by association discussed in chapter one, was dismissed by the courts.³²⁰ The courts noted that the claimant's sole product was hockey whilst that of the defendant was soft drinks. Therefore, there could be no possibility of the defendant misleading the public to believe the defendant's product to be that of the claimants.³²¹ Furthermore, the courts argued that neither the television commercial nor the printed material of the advertising campaign suggested that the claimant had approved, authorised or endorsed the defendant's campaign in any way in terms of a commercial relationship. Finally, the disclaimer under promotional material was enough to put to flight any misleading impressions that may have been created.³²² Hence, for the reasoning of the court mentioned above, the case was dismissed.³²³ What this case highlights is that the criteria for passing off and the criteria for ambush marketing, although similar in theory, are two completely separate entities. It is clear that Pepsi has created a very imaginative ambush marketing stunt, where an association was made

³¹⁷ AG Scaria, *Ambush Marketing: A game within a game*, (Oxford University Press, New Delhi, 2008) pg 75

³¹⁸ National Hockey League v Pepsi Cola Canada Ltd, (1992) 42 CPR (3d) 390

³¹⁹ Pepsi's campaign involved fans being eligible for \$10,000 if they matched actual NHL playoff results with information on Pepsi bottle caps. Pepsi were careful in referring to the event as 'Pro Playoff Hockey Pool' as opposed to 'NHL Playoff Pool.'

³²⁰ Footnote 29 in Phillip Johnson, 'Ambush Marketing: A Practical Guide to Protecting the Brand of a Sporting Event', Sweet & Maxwell London, 2008 pg 58

³²¹ National Hockey League (2002) at para 28

³²² *Ibid* at para 54

³²³ *Ibid* at para 17

with the NHL, yet Canada's passing off laws were unable to provide a significant remedy for the injured party.

Another case worth discussing is the New Zealand Olympic and Commonwealth Games Association v Telecom New Zealand Ltd (Telecom).³²⁴ The claimant in this case argued that the advertisement created by Telecom passed off the defendant as having an association with the Olympic Movement, the Olympic Association and the New Zealand Olympic team. The defendant counter-argued stating that the presence of the word 'rings' and telecom's name was not enough to make the readers of the advert presume of any relationship between the two parties. The court believed that the advertisement was a clever device where a reader would be mildly amused and acknowledge the lateral thinking was involved in creating such an advertisement. As such, they opined that there is a fine distinction between amusing oneself by reading such an advert and drawing an assumption that the use of the five Olympic 'ring words' must have been done so with the authorisation of the Olympic organisation or sponsorship.³²⁵ Scaria argues that this case is of significance in the context of ambush marketing.³²⁶ This is because it shows a clear reluctance on behalf of the judiciary to accept an ambush marketing claim disguised as a passing off claim.³²⁷ The court was also of the opinion that the outcome of this case illustrated the limitations of passing off and the urgent requirement of additional protection by way of legislation against ambush marketing.³²⁸ Justice McGechan expressed that,

'...telecom has been adventurous, perhaps unwisely so, but the Olympic Association, perhaps pushed by the competitor Bell South, may have been perhaps a little paranoid as to possible repercussions...'³²⁹

This statement is destructive to all claimants who have been subjected to ambush marketing, who attempt to utilise passing off as a method of protection. The prospect of being deemed 'paranoid' is clearly a 'sucker-punch' for all potential claimants against ambush marketing. It also renders passing off as incompatible with the criteria of ambush marketing. The main limitation being that successful passing off actions require all elements of its criteria to be fulfilled before one is successful and with an ambush marketing claim, this was on the verge

³²⁴ New Zealand Olympic and Commonwealth Games Association v Telecom New Zealand Ltd [1996] FSR 757

³²⁵ *Ibid* at 763. In arriving to this decision, the court observed that there was no use of the five circles and not a circle in sight. They were of the view that there would be no assumption on behalf of the consumer of a connection between the telecom giant and the Olympics.

³²⁶ AG Scaria, *Ambush Marketing: A game within a game*, (Oxford University Press, New Delhi, 2008) Pg 73

³²⁷ New Zealand [1996] at para 765

³²⁸ *Ibid*

³²⁹ New Zealand [1996] at para 765

of impossible. Interestingly, New Zealand has since enacted the Major Events Management Act of 2007. This is *sui generis* law designed specifically for ambush marketing, for all major events.³³⁰ This case is a further example that the criterion of passing off does not go hand-in-hand with that of ambush marketing.

A final case that can be utilised is *ICC Development Ltd v Arvree Enterprises & ANR*³³¹. Brought forward within Indian jurisdiction, this case involves one of the new imaginative methods of ambush marketing mentioned in chapter one. The main argument of the claimant was to question the defendant's use of the slogans of the event, along with the insertion of a pictorial representation with an imaginative seat and gate number stating 'Cricket World Cup 2003'. They argued that the aforementioned amounted to passing off and ambush marketing as it sought to create an association with the event and sell its merchandise based upon such associations.³³² According to the court, the main question that needed addressing was whether a sufficient number of purchases of the defendant's goods were likely to be unmistakably confused about the source of the defendant's goods or assume a connection between the claimant and defendant? In answering this question, the courts observed that the defendant had not utilised the claimant's 'logo' or the 'mascot' on any of their advertisements. Furthermore, and surprisingly, the court reasoned that the defendants had merely inserted a pictorial representation of a ticket, a seat and the reference to the Cricket World Cup as a means of drawing attention of the purchasing public to the event in question. Therefore, the court decided that the defendant's advertisement showed no likelihood of confusion in the eyes of the public.³³³ Similarly, they found that the advertisement created no association with the ICC. Thus, passing off had failed to provide a remedy despite the defendant making a direct reference to the event in question.

Ultimately and disappointingly in this case, the court decided that despite the defendant making a direct reference to the event in question, if no official logo has been utilised, then one could not claim passing off. In terms of the argument against ambush marketing, the court took a precarious view that ambush marketing was a term utilised by marketing executives only and was significantly different from passing off.³³⁴ Further, the court expressed that passing off involves an element of overt or covert deceit, whereas ambush

³³⁰ S Corbett & Y Van Roy, 'Events Management in New Zealand: one law to rule them all?' *Journal of Business Law*, 2010, 338

³³¹ *ICC Development Ltd v Arvree Enterprises & ANR* 2003 (26) PTC 245 (Del)

³³² *Ibid* at para 9

³³³ *Ibid*

³³⁴ *Ibid* at para 10

marketing involved the opportunistic commercial exploitation of an event. The court also took the view that ambush marketing sought to give the brand more market exposure, without seeking to suggest any connection to the event. Scaria states that it was remarkably ‘threatening to see the observation of the court that ambush marketing lacked deception and was not a wrongful practice’.³³⁵ This view of the court was both surprising and dangerous as there are no concrete guidelines on how to categorise ambush marketing, and the court risked creating unnecessary dicta, which could have been utilised in future cases. This case finally renders passing off as completely inadequate in the context of ambush marketing, especially where the courts would deem ambush marketing as an opportunistically as opposed to unethically. However, the court once again made an effort to state that it was for the legislators to find an amicable solution for ambush marketing, as passing was inappropriate for such claims.³³⁶

The case law discussed above clearly highlights the limitations of passing off. Although all the authority utilised does not fall under UK legislation, passing off action in the jurisdictions aforementioned are similar to that of the UK. The absence of UK authority in the medium of ambush marketing and passing off would inevitably draw the attentions of UK lawyers onto persuasive authority in other jurisdictions. Thus, it can provide a quality persuasive precedent.

Conclusion

The requirements for a successful passing off claim are difficult to satisfy and the courts must decide cases in accordance with such requirements. The cases mirror UK passing off and highlight in some instances that even when an advertiser utilises the name of an event, it may not be enough to satisfy the strict requirement of association. It is also interesting and further verifies the ineffectiveness of passing off, that the courts have recommend time and again the need for anti-ambush legislation when faced with an ambush marketing claim disguised within an action of passing off. After the inadequacy of trademark law, it is perhaps unsurprising to see that passing off too may be inadequate to deal with ambush marketing. It is highly unreliable even when the courts are faced with blatant ambush marketing as in the cases of *ICC v Arvree* and *NHL v Pepsi*. The advertising industry’s claims of adequate

³³⁵ AG Scaria, *Ambush Marketing: A game within a game*, (Oxford University Press, New Delhi, 2008) Pg 75

³³⁶ *Ibid*

Intellectual Property laws in the context of ambush marketing are wide of the mark.³³⁷ Why is passing off inadequate? This comes down to a number of different reasons. Generally, the launching of a successful claim is quite difficult due to strict requirements. Even seeking a remedy against the most blatant attempts at ambush marketing is often rendered futile. The cases above can act as examples of such a point. Secondly, like trademark law, advertisers are prudent and will refrain from utilising Intellectual Property. Thirdly, it is extremely difficult to prove the likelihood of consumer confusion in the context of damages. How does one measure such confusion? What sort of evidence will the court require? Surveys maybe worthwhile, but because of the quick fire nature of ambush marketing, by the time one has been carried out, any interim relief will be pointless. Even with the ambush-market related version of passing off and endorsements, it is extremely difficult to measure consumer confusion and even in instances where names of events have been utilised, claims are still likely to fail. It is one thing where the advertising industry can claim passing off law to be adequate enough to protect the Olympics from ambush marketing,³³⁸ but it is another when limitations of the remedy are pointed out, but are also supported by cases in various jurisdictions that can verify its limitations and failures. Even if an event holder sought to seek an immediate injunction against the ambush marketer, unless there is clear evidence of a breach of any legal provisions, how do they convince the court to pass an injunction without any concrete evidence? Therefore in theory, passing off in the context of ambush marketing has been weighed, measured and found wanting. This, even more so than trademark law because of the authority demonstrating passing off's obvious limitations with claims that have often failed, and judges' continuous pleas for anti-ambush legislation.

Without specific legislation, it would be extremely difficult for one to categorise ambush marketing. This thesis has argued that one's view on the phenomenon will depend upon 'the eye of the beholder', their knowledge and their intentions. It has further been discussed in chapter one that ambush marketing will fall into two categories: ambush marketing being unethical or the opportunistic parallel marketing.³³⁹ Taking this into account, without concrete guidelines for the court, it is extremely difficult for them to comment on ambush marketing matters that may or may not be illegal. One judge may view it as unethical whilst another a good business opportunity. Therefore, the London Act in this respect has been a

³³⁷ Pauline Dore, 'Olympics prompt ambush marketing clampdown' *Managing Intellectual Property*, 09605002, Dec2005/Jan2006 155

³³⁸ Ian Blackshaw, 'Court kick off', *European lawyer*, 2010, p13

³³⁹ See discussion in Chapter one.

proportionate response to ambush marketing. Its specifically designed nature and low threshold in terms of association would be extremely effective in the context of ambush marketing. Furthermore, it does go on to provide some guidelines that ambush marketing that contravenes any of the provisions of the Act is illegal, and hence unethical. Therefore, it can now be safely and confidently argued that based on all of the evidence provided in this thesis, the London Act is an effective, significant and proportionate response to the question of ambush marketing. This is because the Act seems to do what no other laws aim to do, and that is to deal with the phenomenon 'head-on'. It does not outlaw ambush marketing completely and this should be seen as a challenge to ambush marketers. It strives to provide the aggressive level of protection needed by the organisers of the Games.

CONCLUSION

To conclude this research, the main question examined was whether the London Act is a proportionate response to the threat of ambush marketing. It also explored the arguments posed by critics of the London Act after it was enacted. Such arguments were based upon the effectiveness of the UK's existing Intellectual Property law namely trademark law and passing off. This thesis concentrated on such areas.

In respect of the objectives set out in the introduction, this thesis deems the London Act to be a proportionate response. The criticism of the Act is unfair and claims that it 'does not balance the interests of all the parties concerned' are incorrect and without reason. The IOC have a duty to protect the sponsors and it is not incorrect of them to demand such laws when official sponsors have contributed £40 million + for official rights. Furthermore, trademark law and passing off does not agree with ambush marketing and are severely limited in their capacity to effectively protect against the phenomenon. As long as LOCOG keep to their promise and do not bring forth any frivolous claims where one uses the listed expressions then, the Act can be deemed to be a proportionate and well balanced response.

As it has been seen in the preceding pages and chapters, when a person engages in ambush marketing with regards to the Olympics, they are attempting to take a free ride on the intellectual assets associated with the event. Their act may be deemed as unethical. Simultaneously, when a person engages in ambush marketing, they may simply be exploiting a marketing opportunity missed by the official sponsors, or generally seeking to create an association with the event in question. This may be deemed as opportunistic parallel marketing. Because the phenomenon is so ambiguous, there will always be a demand for higher protection from one perspective and a call for reviews in legislation due to the encroachment on the freedoms of non-sponsors.

Whichever way the phenomenon of ambush marketing is viewed, the event holder must deal with the problem in a serious manner. However difficult it may be to believe that a corporation as powerful as the IOC can ever be faced with the possibility of businesses refusing to sponsor them, the threat of business organisations refusing to provide sponsorship funding is real. They will refuse to provide as much funding if the organisation cannot

guarantee the exclusivity that they so crave. Let it not be forgotten that the IOC faced collapse until exclusive sponsorship salvaged their financial situation. That said, the author is also of the opinion that the IOC in particular, to a certain extent, welcome ambush marketing. This is because it will allow them to have a stronghold and a continued monopoly over various governments and organisations. For example, it allows them to demand legislative regimes that are favourable only to selected businesses. It allows them to continue to demand from potential hosts, whilst utilising ambush marketing as a smokescreen to disguise such a monopoly. Furthermore, should there be no ambush marketing, there is a chance that official sponsors could become static and less dynamic in their advertising methods. The threat of ambush marketing, at least, keeps them alert, aware and their advertising efforts dynamic.

The analysis of the effectiveness of traditional legal measures in combating ambush marketing is an eye opener to the fact that, though they can be beneficial in some instances, they are helpless to a great extent in most types of the sophisticated ambush techniques mentioned in the previous chapters. The empirical findings of this research highlight such inadequacies. Traditional legal measures were never designed to be a preventative of ambush marketing. They were merely utilised because there was no other weapon in the armoury. They were designed to protect Intellectual Property and the ambush was a 'new kettle of fish'. Ambush marketing has exposed all of the possible limitations of such measures. The few cases that did come before the courts, across the world, illustrated this reality. The increasing instances across the world of ambush marketing, coupled with the futile attempts of various event organisers utilising traditional Intellectual Property law, obliged event organisers to think of new solution. This also shows that a different response to the threat was required.

Here, there will be a brief summarisation of trademark law and passing off, alongside their questionable effectiveness against ambush marketing. It can be argued that on the outset, trademark law would be an effective weapon to counter ambush marketing, because of the ease of gaining a favourable outcome in court due to the effectiveness of its remedy. However, the Act has not evolved as ambush marketing has and this has been the biggest cause of its downfall as an effective 'protector' of the Games. A trademark has to be used without authority for an action to be brought forward, although it is known from this research that ambush marketers rarely resort to using a registered trademark in their advertising campaigns.

In terms of passing off, there are numerous limitations with the remedy and the lack of success when clear ambush marketing claims, have been brought forward under the remedy is further proof of its ineffectiveness. Even the specific remedy of passing off in terms of endorsement, is not without its limitations. There are instances where cases have failed despite defendants utilising badges, signs, and names of events. The failure of such traditional measures simply reveals the pressing necessity to find out efficient counter measures to effectively tackle the phenomenon.

In respect of this, is the London Act a proportionate response to the assumed threat of ambush marketing at the 2012 Games? This can be argued to be a positive statement and one that can be answered with a resounding 'Yes'. The London Act is specifically designed sui generis legislation that clearly aims to counter ambush marketing. It has been developed for that sole purpose in order to satisfy the IOC and their pre requisites for hosting an event. It is clear that various elements of trademark law and passing off does not agree with ambush marketing. Some of the provisions of the Act are ground breaking in its quest to hold a clean event. The Act is comprehensive and somewhat aggressive against ambush marketing. It is also broad and flexible and covers ticket touting and street trading within its remit. It can be argued that the Act is a necessity to counter current ambush techniques.

There are clear issues with the balance of the Act and whether it balances the rights of the organiser against ambush marketers. A caveat of this research that needs to be noted is the lack of clear examples of LOCOG using their powers under the Act. However, a lack of examples can be attributed to LOCOG being very reserved in their approach. Provided that LOCOG use the Act in a controlled manner, the Act would be seen as more balanced. The current research findings add substantially to the knowledge that the inadequacy of traditional measures coupled with the aggressive nature of the London Act deems the Act to be a proportionate response in the context of ambush marketing. Furthermore, academics like Sheridan have recommended that the US adopt a similar approach in a manner to assist their Lanham Act (US version of trademark law) against ambush marketing. This further shows that there is a lack of faith in other jurisdictions' trademark laws when it comes to ambush marketing, and they also render trademark law as incapable of protecting against the phenomenon.

Nevertheless, the Act is not without criticism and the organisers were criticised for attempting to reverse the burden of proof, an action that would have made the Act draconian

and detrimental, which is contrary to human rights. Furthermore, anti-ambush fixation of the event holders has become excessive, and impairs the excitement of the Games. It should not be forgotten that most of this criticism has come from advertising agencies and if the Act was as draconian as they claim, it would not have secured safe passage through the House of Lords. The Act does not outlaw ambush marketing. They simply have to be savvy enough to exploit the restrictions within the Act.

This potentially leads onto a further area of research. The London Act is designed specifically for the Games and will cease to run in December 2012. It may be worthwhile the UK passing sui generis legislation that could be utilised for all major sporting events held in the UK. For example the Commonwealth Games in 2014 and had England been successful for the 2018 World Cup, FIFA would have demanded similar protection to that of the Olympics. This type of legislation has already been incorporated by New Zealand, where their Major Events Management Act of 2007 is specifically designed not only for sporting events but all events in general. Further research could be undertaken to see whether such an Act is possible and discussions on whether the Act can be successfully integrated into the English legal system. Similar questions asked in this thesis will need to be addressed such as striking the correct balance between event organisers and opportunistic marketers.

It will also be worthwhile to undertake in research after the Olympic Games in London to see if any ambush marketing did take place and what actions, if any, were taken by LOCOG. This will provide an idea of how well the Act protected the Games as most ambushes are carried out during the event itself. Again, such research will assist when discussing the proposals of future sui generis legislation.

ADDENDUM

There have been some further developments in relation to the advertising and trading regulations in relation to London Act. The London Olympic Games and Paralympic Games (Amendment) Bill was introduced within the House of Commons on 16th march 2011. A government research paper on the bill has also been prepared for the second reading debate at the House of Commons.³⁴⁰ The idea of the regulations in relation to the actual event itself was referred to chapter two.³⁴¹ Any amendments made to the legislation will be made with the intention to meet the commitments made by London to the IOC when bidding for the Games. For our discussion, this includes, preventing ambush marketing within the vicinity of Olympic Venues.³⁴²

The advertising restrictions would apply for a very limited period only (covering the actual Games) but what is extremely interesting, is that the legislature has again inserted a clause that attempts to reverse the presumption of guilt.³⁴³ This is surprising, considering the House of Lords rejected such a presumption for the 2006 Act. It seems that on this occasion, within the bill's consultation questions, the department for Culture, Media and Sport attempt to justify the reasoning behind the proposed reversal of the presumption of guilt.³⁴⁴ They believe that such a presumption can be applied, and hence contravene article 6(2) of the ECHR where the interference furthers a legitimate aim and is reasonably proportionate for that aim.³⁴⁵ This thesis argues strongly that such a presumption would be a disproportionate response (and draconian) to the threat of ambush marketing, as such a presumption is not required for the IOC's host city contract. With the bill being in its early stages, it is not clear whether the House of Lords would accept such a presumption, knowing the IOC does not require it, but it will definitely be an interesting development nonetheless.

³⁴⁰ *London Olympic games and Paralympic Games (Amendment) Bill*, Bill 165 of 2010-12, Research paper 11/34, 21/04/2011

³⁴¹ Chapter 2, pg 29

³⁴² Department for Culture, Media and Sport: Regulations on Advertising Activity and Trading around London 2012, A Consultation, March 2011, accessed at

http://www.culture.gov.uk/images/consultations/ConsDoc_Regulations_on_Advertising_and_Trading_London_2012.pdf last accessed 01/09/2011

³⁴³ *Ibid* 94

³⁴⁴ *Ibid*

³⁴⁵ *Ibid*

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Appendices

Schedule 4, London Olympic Association Right

London Olympic Games and Paralympic Games Act 2006

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SCHEDULES

SCHEDULE 4

Section 33

LONDON OLYMPICS ASSOCIATION RIGHT

The right

- 1 (1) There shall be a right, to be known as the London Olympics association right, which shall confer exclusive rights in relation to the use of any representation (of any kind) in a manner likely to suggest to the public that there is an association between the London Olympics and—
- (a) goods or services, or
 - (b) a person who provides goods or services.
- (2) For the purposes of this Schedule—
- (a) the concept of an association between a person, goods or a service and the London Olympics includes, in particular—
 - (i) any kind of contractual relationship,
 - (ii) any kind of commercial relationship,
 - (iii) any kind of corporate or structural connection, and
 - (iv) the provision by a person of financial or other support for or in connection with the London Olympics, but
 - (b) a person does not suggest an association between a person, goods or a service and the London Olympics only by making a statement which—
 - (i) accords with honest practices in industrial or commercial matters, and
 - (ii) does not make promotional or other commercial use of a representation relating to the London Olympics by incorporating it in a context to which the London Olympics are substantively irrelevant.
- (3) The Secretary of State may by order specify what is to be or not to be treated for the purposes of sub-paragraph (2) as an association between a person, goods or a service and the London Olympics; and an order under this subsection—
- (a) may include incidental, consequential or transitional provision (which may include provision amending sub-paragraph (2)(a) or (b)),
 - (b) shall be made by statutory instrument, and
 - (c) may not be made unless a draft has been laid before and approved by resolution of each House of Parliament.

Infringement: general

- 2 (1) A person infringes the London Olympics association right if in the course of trade he uses in relation to goods or services any representation (of any kind) in a manner

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likely to suggest to the public that there is an association between the London Olympics and—

- (a) the goods or services, or
- (b) a person who provides the goods or services.

(2) Sub-paragraph (1) is subject to the provisions of this Schedule.

Infringement: specific expressions

- 3 (1) For the purpose of considering whether a person has infringed the London Olympics association right a court may, in particular, take account of his use of a combination of expressions of a kind specified in sub-paragraph (2).
- (2) The combinations referred to in sub-paragraph (1) are combinations of—
- (a) any of the expressions in the first group, with
 - (b) any of the expressions in the second group or any of the other expressions in the first group.
- (3) The following expressions form the first group for the purposes of sub-paragraph (2)
- (a) “games”,
 - (b) “Two Thousand and Twelve”,
 - (c) “2012”, and
 - (d) “twenty twelve”.
- (4) The following expressions form the second group for the purposes of sub-paragraph (2)—
- (a) gold,
 - (b) silver,
 - (c) bronze,
 - (d) London,
 - (e) medals,
 - (f) sponsor, and
 - (g) summer.
- (5) It is immaterial for the purposes of this paragraph whether or not a word is written wholly or partly in capital letters.
- (6) The Secretary of State may by order add, remove or vary an entry in either group of expressions.
- (7) An order under sub-paragraph (6)—
- (a) shall be made by statutory instrument, and
 - (b) may not be made unless a draft has been laid before and approved by resolution of each House of Parliament.
- (8) An order under sub-paragraph (6) which adds or varies an entry in a group of expressions may be made only if the Secretary of State thinks it necessary in order to prevent commercial exploitation of the London Olympics.
- (9) Before laying a draft order in accordance with sub-paragraph (7)(b) the Secretary of State shall consult—

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- (a) one or more persons who appear to him to have relevant responsibility for regulating the advertising industry (including enforcing standards of professional conduct),
- (b) one or more persons who appear to him to represent the interests of the advertising industry,
- (c) the London Organising Committee, and
- (d) such other persons as he thinks appropriate.

Authorised use

- 4 (1) The London Olympics association right is not infringed by use of a representation in accordance with an authorisation granted by the London Organising Committee.
- (2) The London Organising Committee shall make arrangements for the grant of authorisations; and the arrangements may, in particular—
 - (a) make provision about charges;
 - (b) enable the Committee to exercise unfettered discretion (subject to any direction under section 15 of the Olympic Symbol etc. (Protection) Act 1995 (c. 32) as applied by paragraph 10 below).
- 5 (1) The London Organising Committee shall maintain a register of persons, and classes of person, authorised for the purposes of paragraph 4.
- (2) The register shall specify in respect of each authorised person—
 - (a) his name,
 - (b) his principal place of business,
 - (c) the goods or services to which the authorisation relates,
 - (d) the period in respect of which the authorisation has effect.
- (3) The register shall specify in respect of each authorised class of person—
 - (a) the nature of the class,
 - (b) the goods or services to which the authorisation relates (including the circumstances in which it does or does not apply), and
 - (c) the period in respect of which the authorisation has effect.
- (4) The London Organising Committee shall—
 - (a) ensure that a copy of the register is accessible to the public by use of the internet, and
 - (b) comply with a written request for a copy of the register or of an entry in the register.
- (5) The London Organising Committee may require a request under sub-paragraph (4) (b) to be accompanied by a specified fee; and the Committee—
 - (a) may specify different fees for different purposes,
 - (b) may charge no fee, or waive a fee, in such cases as it thinks appropriate, and
 - (c) may not specify a fee which exceeds any maximum specified by order of the Secretary of State.
- (6) An order under sub-paragraph (5)(c)—
 - (a) may make different provision for different purposes,
 - (b) may include transitional provision,
 - (c) shall be made by statutory instrument, and

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- (d) shall be subject to annulment in pursuance of a resolution of either House of Parliament.
- (7) If a copy of the register or of an entry in the register issued by the London Organising Committee is certified on behalf of the Committee as an accurate copy, it shall be treated as accurate for all purposes (including for the purposes of legal proceedings) unless the contrary is proved.
- (8) A request for a copy under sub-paragraph (4)(b) may require the copy to be certified in accordance with sub-paragraph (7).

Infringement: other exceptions

- 6 The London Olympics association right is not infringed by the use of a trade mark registered under the Trade Marks Act 1994 (c. 26) in relation to goods or services for which it is registered.
- 7 The London Olympics association right is not infringed by—
 - (a) the use by a person of his own name or address,
 - (b) the use of indications concerning the kind, quality, quantity, intended purpose, value, geographical origin, time of production of goods or of rendering of services, or other characteristics of goods or services,
 - (c) the use of a representation which is necessary to indicate the intended purpose of a product or service;
 provided, in each case, that the use is in accordance with honest practices in industrial or commercial matters.
- 8 (1) The London Olympics association right is not infringed by the use of a representation
 - (a) in publishing or broadcasting a report of a sporting or other event forming part of the London Olympics,
 - (b) in publishing or broadcasting information about the London Olympics,
 - (c) as an incidental inclusion in a literary work, dramatic work, artistic work, sound recording, film or broadcast, within the meaning of Part I of the Copyright, Designs and Patents Act 1988 (c. 48) (copyright), or
 - (d) as an inclusion in an advertisement for a publication or broadcast of a kind described in paragraph (a) or (b).
 (2) But the exceptions in sub-paragraph (1)(a) and (b) do not apply to advertising material which is published or broadcast at the same time as, or in connection with, a report or information.
- 9 The London Olympics association right is not infringed by the use of a representation in relation to goods if—
 - (a) they were put on the market in the European Economic Area in accordance with an authorisation granted by the London Organising Committee,
 - (b) the representation was used in relation to the goods when they were put on the market, and
 - (c) the London Organising Committee does not oppose further dealings in the goods for legitimate reasons (including, in particular, that the condition of the goods has been changed or impaired after they were put on the market).

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Application of Olympic Symbol etc. (Protection) Act 1995

- 10 (1) The following provisions of the Olympic Symbol etc. (Protection) Act 1995 (c. 32) shall have effect (with any necessary modifications) in relation to the London Olympics association right as they have effect in relation to the Olympics association right—
- (a) section 2(2) to (4) (effect of right),
 - (b) section 3(2) (infringement: specific cases),
 - (c) section 4(11) to (14) (infringement: protection for existing rights),
 - (d) section 5 (power to prescribe further limitations),
 - (e) section 6 (action for infringement),
 - (f) section 7 (orders in relation to infringing goods, &c.),
 - (g) section 15 (directions by Secretary of State), and
 - (h) section 16 (action for groundless threats).
- (2) In the application of provisions of that Act by virtue of sub-paragraph (1)—
- (a) a reference to a controlled representation is a reference to a visual or verbal representation (of any kind) likely to create in the public mind an association between the London Olympics and—
 - (i) goods or services, or
 - (ii) a provider of goods or services,
 - (b) a reference to the person appointed under section 1(2) as proprietor shall be taken as a reference to the London Organising Committee,
 - (c) a reference to the commencement of that Act shall be taken as a reference to the commencement of this Schedule, and
 - (d) a reference to the Olympic Games or the Olympic movement or to the Paralympic Games or the Paralympic movement shall be taken as a reference to the London Olympics.
- (3) In each case, a reference in sub-paragraph (1) to a provision of that Act is to that provision as amended by Schedule 3 above.

Changes to legislation:

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Changes and effects yet to be applied to :

- Sch. 4 ceased to have effect by [2006 c. 12 s. 40\(8\)](#)
- Sch. 4 para. 1 text amended by [S.I. 2007/2129 Sch. para. 6\(1\)\(t\)](#)
- Sch. 4 para. 3 text amended by [S.I. 2007/2129 Sch. para. 6\(1\)\(t\)](#)
- Sch. 4 para. 5 text amended by [S.I. 2007/2129 Sch. para. 6\(1\)\(t\)](#)
- Sch. 4 para. 10 text amended by [S.I. 2007/2129 Sch. para. 6\(1\)\(t\)](#)
- Sch. 4 para. 1 text amended by [S.I. 2010/1551 Sch. para. 8\(1\)\(t\)](#)
- Sch. 4 para. 3 text amended by [S.I. 2010/1551 Sch. para. 8\(1\)\(t\)](#)
- Sch. 4 para. 5 text amended by [S.I. 2010/1551 Sch. para. 8\(1\)\(t\)](#)
- Sch. 4 para. 10 text amended by [S.I. 2010/1551 Sch. para. 8\(1\)\(t\)](#)

Changes and effects yet to be applied to the whole Act, associated Parts and Chapters:

- Act functions ceased to be exercisable concurrently by [S.I. 2010/1551 art. 7\(d\)](#)
- Act functions made exercisable concurrently by [S.I. 2007/2129 art. 3\(1\)art. 3\(2\)\(d\)](#)

Commencement Orders yet to be applied to the London Olympic Games and Paralympic Games Act 2006:

Commencement Orders bringing provisions within this Act into force:

- [S.I. 2006/1118 art. 2-5](#) commences ([2006 c. 12](#))
- [S.I. 2007/1064 art. 2](#) commences ([2006 c. 12](#))
- [S.I. 2009/2577 art. 2](#) commences ([2006 c. 12](#))
- [S.S.I. 2006/611 art. 2](#) commences ([2006 c. 12](#))

Commencement Orders bringing legislation that affects this Act into force:

- [S.I. 2011/1066 art. 2](#) commences ([2010 c. 15](#))



London Olympic Games and Paralympic Games Act 2006

2006 CHAPTER 12

PROSPECTIVE

Advertising

19 Advertising regulations

- (1) The Secretary of State shall make regulations about advertising in the vicinity of London Olympic events.
- (2) In making the regulations the Secretary of State—
 - (a) shall aim to secure compliance with obligations imposed on any person by the Host City Contract,
 - (b) shall have regard to any requests or guidance from the International Olympic Committee, and
 - (c) shall also have regard to amenity and public safety.
- (3) The regulations shall specify, or provide criteria for determining—
 - (a) the places in respect of advertising in which the regulations apply,
 - (b) the nature of the advertising in respect of which the regulations apply, and
 - (c) what is, or is not, to be treated for the purposes of the regulations as advertising in the vicinity of a place.
- (4) The regulations may apply in respect of advertising of any kind including, in particular—
 - (a) advertising of a non-commercial nature, and
 - (b) announcements or notices of any kind.
- (5) The regulations may apply in respect of advertising in any form including, in particular—
 - (a) the distribution or provision of documents or articles,

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- (b) the display or projection of words, images, lights or sounds, and
 - (c) things done with or in relation to material which has or may have purposes or uses other than as an advertisement.
- (6) The regulations shall specify, or provide criteria for determining, the period of time during which they apply; and—
- (a) the regulations shall apply only for such time as the Secretary of State considers necessary for the purpose of securing compliance with obligations imposed on any person by the Host City Contract, and
 - (b) the regulations may apply during different periods in respect of different places.
- (7) The regulations shall permit, subject to any specified conditions, advertising undertaken or controlled by—
- (a) any person specified in the regulations as appearing to the Secretary of State to have responsibility in accordance with the Host City Contract for the control of advertising in relation to the London Olympics (“a responsible body”), or
 - (b) any person authorised by a responsible body (whether or not subject to terms and conditions and whether or not in accordance with a sponsorship or other commercial agreement).
- (8) The regulations—
- (a) may prohibit action of a specified kind or in specified circumstances,
 - (b) may impose obligations on persons who—
 - (i) take action in relation to an advertisement, or
 - (ii) have an interest in or responsibility for a product or service to which an advertisement relates,
 - (c) may impose obligations on persons who own, occupy or have responsibility for the management of land, premises or other property,
 - (d) may, in particular, impose on a person an obligation to take steps to ensure—
 - (i) that other persons do not take action of a particular kind;
 - (ii) that a situation is not permitted to continue, and
 - (e) shall have effect despite any consent or permission granted (whether before or after the commencement of the regulations) by any landowner, local authority or other person.

20 Regulations: supplemental

- (1) Regulations under section 19—
- (a) may, to a specified extent or for specified purposes, disapply or modify specified enactments relating to planning or the control of advertising,
 - (b) may apply (with or without modifications) or make provision similar to any enactment (including, but not limited to, provisions of Chapter III of Part VIII of the Town and Country Planning Act 1990 (c. 8) (control of advertising) and regulations under that Chapter),
 - (c) may provide for exceptions (in addition to those referred to in section 19(7)) which may be expressed by reference to the nature of advertising, its purpose, the circumstances of its display or any other matter (which may include the consent of a specified person),

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- (d) may make provision for application, with any specified modifications or exceptions, to the Crown,
 - (e) may make provision which applies generally or only for specified purposes or in specified circumstances,
 - (f) may make different provision for different purposes or circumstances, and
 - (g) may apply in relation to advertising whether or not it consists of the result or continuation of activity carried out before the regulations come into force.
- (2) Regulations under section 19—
- (a) shall be made by statutory instrument, and
 - (b) may not be made unless a draft has been laid before and approved by resolution of each House of Parliament.
- (3) Before making regulations under section 19 the Secretary of State shall consult—
- (a) such authorities, with responsibilities for planning in respect of places to which the regulations apply or may apply, as he thinks appropriate,
 - (b) one or more persons who appear to the Secretary of State to represent interests within the advertising industry which are likely to be affected by the regulations,
 - (c) such other persons, who appear to the Secretary of State to represent interests likely to be affected by the regulations, as he thinks appropriate,
 - (d) the Olympic Delivery Authority, and
 - (e) the London Organising Committee.
- (4) If regulations under section 19 would be treated as a hybrid instrument for the purposes of the standing orders of either House of Parliament, they shall proceed in that House as if they were not a hybrid instrument.

21 Offence

- (1) A person commits an offence if he contravenes regulations under section 19.
- (2) It shall be a defence for a person charged with an offence under subsection (1) to prove that the contravention of the regulations occurred—
- (a) without his knowledge, or
 - (b) despite his taking all reasonable steps to prevent it from occurring or (where he became aware of it after its commencement) from continuing.
- (3) A person guilty of an offence under subsection (1) shall be liable—
- (a) on conviction on indictment, to a fine, or
 - (b) on summary conviction, to a fine not exceeding £20,000.
- (4) A court by or before which a person is convicted of an offence under subsection (1) may require him to pay to a police authority or to the Olympic Delivery Authority sums in respect of expenses reasonably incurred in taking action under section 22(1) in relation to the matters to which the offence relates.

22 Enforcement: power of entry

- (1) A constable or enforcement officer may—
- (a) enter land or premises on which they reasonably believe a contravention of regulations under section 19 is occurring (whether by reason of advertising

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- on that land or premises or by the use of that land or premises to cause an advertisement to appear elsewhere);
- (b) remove, destroy, conceal or erase any infringing article;
 - (c) when entering land under paragraph (a), be accompanied by one or more persons for the purpose of taking action under paragraph (b);
 - (d) use, or authorise the use of, reasonable force for the purpose of taking action under this subsection.
- (2) The power to enter land or premises may be exercised only at a time that a constable or enforcement officer thinks reasonable having regard to the nature and circumstances of the contravention of regulations under section 19.
- (3) Before entering land or premises a constable or enforcement officer must take reasonable steps to—
- (a) establish the identity of an owner, occupier or person responsible for the management of the land or premises or of any infringing article on the land or premises, and
 - (b) give any owner, occupier or responsible person identified under paragraph (a) such opportunity as seems reasonable to the constable or enforcement officer in the circumstances of the case to end the contravention of the regulations (whether by removing, destroying or concealing any infringing article or otherwise).
- (4) The power to enter premises may be exercised in relation to a dwelling only in accordance with a warrant issued by a justice of the peace; and a justice of the peace may issue a warrant only if satisfied on the application of a constable or enforcement officer that—
- (a) there are reasonable grounds to believe a contravention of regulations under section 19 is occurring in the dwelling or on land that can reasonably be entered only through the dwelling,
 - (b) the constable or enforcement officer has complied with subsection (3),
 - (c) the constable or enforcement officer has taken reasonable steps to give notice to persons likely to be interested of his intention to apply for a warrant, and
 - (d) that it is reasonable in the circumstances of the case to issue a warrant.
- (5) The power to remove an article may be exercised only if the constable or enforcement officer thinks it necessary for the purpose of—
- (a) ending the contravention of regulations under section 19,
 - (b) preventing a future contravention of the regulations,
 - (c) enabling the article to be used as evidence in proceedings for an offence under section 21, or
 - (d) enabling the article to be forfeited in accordance with section 143 of the Powers of Criminal Courts (Sentencing) Act 2000 (c. 6).
- (6) An article removed—
- (a) if removed by an enforcement officer, shall as soon as is reasonably practicable be delivered to a constable, and
 - (b) whether removed by or delivered to a constable, shall be treated as if acquired by the constable in the course of the investigation of an offence.
- (7) Having exercised a power under this section a constable or enforcement officer—
- (a) shall take reasonable steps to leave the land or premises secure, and

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- (b) shall comply with any provision of regulations under section 19 about informing specified persons of what the constable or enforcement officer has done.
- (8) Regulations under section 19 shall include provision enabling a person whose property is damaged in the course of the exercise or purported exercise of a power under this section (other than a person responsible for a contravention of the regulations or for the management of an infringing article) to obtain compensation from a police authority or the Olympic Delivery Authority; and the regulations may, in particular, include provision—
 - (a) conferring jurisdiction on a court or tribunal;
 - (b) about appeals.
- (9) A police authority or the Olympic Delivery Authority may recover from a person responsible for the contravention of the regulations, as if it were a debt, the reasonable costs of taking action under this section.
- (10) In this section—
 - “enforcement officer” means a person designated for the purposes of that subsection by the Olympic Delivery Authority (and paragraph 29(1)(a) to (d) of Schedule 1 shall apply to an enforcement officer whether or not he is a member of the Authority's staff), and
 - “infringing article” means—
 - (a) an advertisement which contravenes regulations under section 19, and
 - (b) any other thing that constitutes a contravention of regulations under section 19 or is being used in connection with a contravention of the regulations.

23 Role of Olympic Delivery Authority

- (1) The Olympic Delivery Authority shall make arrangements to have the effect of regulations made or expected to be made under section 19 brought to the attention of persons likely to be affected or interested.
- (2) In exercising their function under subsection (1) the Authority shall—
 - (a) aim to give two years' notice of the general nature of the regulations, and
 - (b) aim to give six months' notice of the detailed provisions of the regulations.
- (3) The Olympic Delivery Authority—
 - (a) shall make available to persons who are or may be affected by regulations under section 19 advice about the effect or likely effect of the regulations, and
 - (b) may give assistance (which may include financial assistance) in complying with or avoiding breaches of the regulations.
- (4) The Olympic Delivery Authority may institute criminal proceedings in respect of an offence under section 21.
- (5) Subsection (4) shall not apply in relation to the institution of proceedings in Scotland or Northern Ireland.
- (6) The Olympic Delivery Authority shall—
 - (a) prepare a strategy for the exercise of their functions under this section and under section 22,

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- (b) submit the strategy to the Secretary of State,
- (c) revise the strategy until it obtains the Secretary of State's approval, and
- (d) publish the strategy as approved.

24 Local planning authorities

- (1) The Secretary of State may by order require a specified local planning authority who grant advertising consent to a person to notify him of the effect of—
 - (a) section 19(8)(e), and
 - (b) any regulations under section 19.
- (2) In subsection (1) “advertising consent” means consent of such kind as the order shall specify.
- (3) An order under subsection (1)—
 - (a) shall be made by statutory instrument, and
 - (b) shall be subject to annulment in pursuance of a resolution of either House of Parliament.

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