



Ambush Marketing Legislation to Protect Olympic Sponsors: A Step Too Far in the Name of Brand Protection?

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ABSTRACT (EN): Ambush marketing and its threat to brand equity have been identified as key concerns for mega sport event organizations and their sponsors. In recent years, international sport federations have sought to leverage the enormous interest in hosting their events in order to make anti-ambush marketing legislation a requirement for a successful bid. While sponsors may applaud such added protection, there are potentially a number of negative impacts that deserve consideration when discussing ambush marketing legislation.

In this chapter, the authors examine the growing trend towards anti-ambush marketing legislation. Using the Olympic Games as a model, the authors provide a brief overview of the Olympic brand, Olympic sponsorship, and the brand management/protection strategies developed by the International Olympic Committee. Particular attention is paid to the Vancouver Olympic Committee (VANOC) for the 2010 Olympic Winter Games and to the legislation enacted by the Canadian government to protect the Olympic and Paralympic brands. The authors examine some of the issues that arose around the Vancouver Games, and discuss the impact of the growing use of anti-ambush legislation as the ultimate weapon to protect sponsors. While more research is needed to assess fully the impact of such legislation on various stakeholders, there are signs that it may do more harm than good.

RÉSUMÉ (FR): Le marketing insidieux (« ambush marketing ») et ses éventuelles menaces pour la valeur d'une marque sont considérés comme une

préoccupation majeure pour les organisations de méga événements sportifs et leurs commanditaires. Au cours de la dernière année, les fédérations sportives internationales ont cherché à susciter un intérêt considérable en organisant leurs événements de façon à ce qu'une législation contre le marketing insidieux devienne une condition à l'obtention des Jeux. Bien qu'il soit possible que les commanditaires se réjouissent de cette protection supplémentaire, il existe un certain nombre d'éventuels effets néfastes qui doivent être pris en compte lors de toute discussion entourant une législation contre le marketing insidieux.

Dans ce chapitre, les auteurs examinent la tendance croissante parmi les organisateurs de méga événements sportifs d'insister sur l'adoption d'une législation visant à assurer une protection contre le marketing insidieux. En se servant des Jeux Olympiques comme modèle, les auteurs présentent un bref aperçu de la marque olympique, de la commandite des Jeux Olympiques et des stratégies visant la gestion/la protection élaborées par le Comité International Olympique (CIO). L'étude s'attarde plus particulièrement sur le Comité olympique de Vancouver (VANOC) pour les jeux olympiques d'hiver 2010 et sur la législation adoptée par le gouvernement canadien en vue de protéger les marques olympiques et paralympiques. Les auteurs analysent certaines des questions qui surgissent en relation avec les Jeux de Vancouver et discutent ensuite de l'incidence du recours croissant à la législation contre le marketing insidieux en tant qu'arme de dernier ressort pour protéger les commanditaires. Bien qu'il soit nécessaire de mener des recherches plus approfondies si l'on veut évaluer pleinement l'incidence d'une telle législation sur les diverses parties prenantes, certains signes donnent à penser qu'elle pourrait causer plus de tort que de bien.

A. INTRODUCTION

Ambush marketing is now an expected part of the marketing and sponsorship landscape that surrounds major sport events. This is primarily the result of two developments in the sport marketing field. First, global sport properties (e.g., Olympic Games or FIFA World Cup) and national properties (e.g., Hockey Canada, Curling's Brier) have succeeded in building strong brands that connect emotionally with large numbers of consumers. Second, sponsorship "exclusivity" in predetermined product categories has become a key element of all major sport properties' strategy. While "exclusivity" has contributed to significant growth in revenue for sport properties such as the

Olympics, it has also made them valued commodities for corporations wishing to gain benefits through association. For example, the financial contribution of worldwide Olympic sponsors (TOP sponsors) and domestic sponsors for the 2010 Vancouver Olympic Winter Games reached nearly US \$1 billion or 60% of the Organizing Committee's budget of \$1.6 billion.¹ In the case of FIFA, marketing revenue for the period 2007–10 was more than \$1 billion.² Given the desirability of such properties and the hefty price tag to acquire exclusive rights, there has been a growth in companies wishing to reap some of the benefits of sponsorship (e.g., brand associations) without paying for those association rights. This is called ambush marketing.

Ambush marketing can be defined as the practice whereby a company, often a competitor of an event's sponsor, intrudes upon public attention surrounding the event, thereby drawing attention to itself and away from the sponsor.³ For example, during the 2006 FIFA World Cup in Germany, the nose cones of forty airplanes owned by Lufthansa German Airlines were painted to resemble a football, raising the ire of the FIFA, and the official airline sponsor, Air Emirates.⁴ While Lufthansa made no claims about any direct association with the World Cup, corporations who use such strategies do so to connect themselves to the event in consumers' minds. Another example linked to the 2010 Olympic Winter Games in Vancouver is Esso (Imperial Oil) and the promotion of its long-time association with Hockey Canada to direct attention to their brand through creative and effective thematic promotion — “Cheers for Canada.” This promotion was executed at all Esso stations across Canada through well-placed signage at the point of purchase (i.e., pumps) using imagery and the well-known Hockey Canada brand. While Esso was careful not to infringe on the trademarks associated with the 2010 Games, its promotional campaign played on Canadians' passion for and strong emotional connection to hockey and indirectly to the Olympic Winter Games.

1 Dana Ellis, Marie-Ève Gauthier, & Benoit Séguin, “Ambush Marketing, the Olympic and Paralympic Marks Act and Canadian Sports Organisations: Awareness, Perceptions and Impacts” (2011) 4:3 *Journal of Sponsorship* 253 at 255; all dollar figures in this paper are in US dollar currency.

2 FIFA, *FIFA Financial Report 2010*, online: [www.fifa.com/mm/document/affederation/administration/01/39/20/45/web_fifa_fr2010_eng\[1\].pdf](http://www.fifa.com/mm/document/affederation/administration/01/39/20/45/web_fifa_fr2010_eng[1].pdf).

3 Tony Meenaghan, “Ambush Marketing — A Threat to Corporate Sponsorship” (1996) 38:1 *Sloan Management Review* 103 at 103.

4 Bill Wilson, “Protecting Sport Sponsors from Ambush” *BBC News* (20 February 2006) online: [BBC News http://news.bbc.co.uk/2/hi/business/4719368.stm](http://news.bbc.co.uk/2/hi/business/4719368.stm).

Such practice is often a planned effort by non-sponsors to gain at least some of the recognition and benefits that are associated with being an official sponsor.⁵ In other words, non-sponsors seek to connect themselves to the event's brand in the consumer's mind. Whether ambush marketing is considered a legitimate business practice really depends on which side of the argument one falls. Nonetheless, the financial stakes are real and consequently the pressures placed on event organizers to protect the investments of corporate partners are immense. Rights holders such as the International Olympic Committee (IOC) have responded forcefully to ambush marketing activities by increasing the demands on cities/countries interested in hosting the Olympic Games to control the marketing activities around the Games, to protect their brands, and ultimately to ensure sponsor exclusivity.⁶ For instance, the IOC now requires that host countries enact legislation aimed at protecting its brand(s) against ambush marketing.

In this chapter, the Olympic Games are examined to determine how mega sporting events protect their brands against activities such as ambush marketing. We begin with a brief overview of the Olympic brand, Olympic sponsorship, and the brand management/protection strategies developed by the IOC and the Vancouver Olympic Committee (VANOC) for the 2010 Olympic Winter Games, including special legislation to protect the Olympic and Paralympic brands. We then examine some of the issues that arose in relation to the Vancouver Games and discuss the impact of the growing use of anti-ambush legislation as the ultimate weapon to protect sponsors.

B. OLYMPIC MARKETING

The creation of an innovative marketing program in 1985 marked the beginning of a new era for the IOC. In fact, the IOC's decision to take sole control of the negotiation of television and sponsorship rights for the Olympic Games quickly diversified the organization's revenue base and positioned it as one of the most powerful sport organizations in the world. Since 1992, revenue from Olympic marketing programs (i.e., broadcasting, sponsorship,

5 Dennis M Sandler & David Shani, "Olympic Sponsorship vs. 'Ambush' Marketing: Who Gets the Gold?" (1989) 29:4 *Journal of Advertising Research* 9 at 9.

6 Holger Preuss, Kai Gemeinder, & Benoit Séguin, "Ambush Marketing in China: Counterbalancing Olympic Sponsorship Efforts" (2008) 7:2 *Asian Business & Management* 243 at 246-47; Benoit Séguin & Norman J O'Reilly, "The Olympic Brand, Ambush Marketing and Clutter" (2008) 4:1 *International Journal of Sport Management & Marketing* 62 at 74-75.

ticketing, and licensing) generated more than \$23.5 billion for the Olympic Movement.⁷ The IOC went from a nearly bankrupt “amateur” run organization to a multi-billion dollar business. It reformed its business model and adopted a “strategic brand management” philosophy to its marketing efforts towards the latter part of the 1990s.⁸ Such an approach was believed to be innovative for a sport organization but in line with the beliefs of large corporations (e.g., sponsors) that a business should manage its brand strategically in order to maximize its brand equity.⁹

C. OLYMPIC SPONSORSHIP

Olympic sponsorship consists of a complex set of exclusive worldwide (TOP) and national (Olympic Games and National Olympic Committees) rights. The TOP program grants exclusive rights to specific Olympic intellectual property and Olympic marketing opportunities in exchange for financial support and goods and services contributions. The global marketing rights include partnerships with the IOC, all 205 National Olympic Committees (NOCs) and their Olympic teams, and the two Organizing Committees of Olympic Games (OCOGs) — one winter and one summer. The TOP partners can use these rights globally and can activate marketing initiatives nationally. TOP has been one of the most successful sport sponsorship programs in the world generating more than \$3 billion in rights fees (cash and in-kind) since its inception in 1985. The most recent program, TOP VII (2009–12), generated \$957 million.¹⁰

Sponsorship is also an important source of revenue for OCOGs and NOCs. In the case of OCOGs, domestic sponsorship programs contribute to the staging of the Games. While sponsors’ marketing rights are restricted to the country of the OCOG, the revenues from these programs are comparable to TOP. For example, the 2008 Beijing Olympic Games raised \$1.2 billion in domestic sponsorship compared to \$866 million for TOP VI (2005–08). In the case of the 2010 Olympic Winter Games in Vancouver, the Organizing Com-

7 IOC, *Olympic Marketing Fact File 2012* (Lausanne: International Olympic Committee, 2012) online: www.olympic.org/Documents/IOC_Marketing/OLYMPIC-MARKETING-FACT-FILE-2012.pdf [IOC].

8 Norman O’Reilly & Benoit Séguin, *Sport Marketing: A Canadian perspective* (Toronto: Nelson Education Ltd, 2009) at 367.

9 See, generally, David A Aaker, *Managing Brand Equity: Capitalizing on the Value of a Brand Name* (New York: The Free Press, 1991).

10 IOC, above note 7.

mittee's (i.e., VANOC) domestic sponsorship program brought in \$688 million, a record for a Winter Games. Such successful programs are credited in part to the IOC/OCOGs' efforts to control the marketplace in host countries.

1) Olympic Brand

A brand is a name or symbol that helps differentiate one product from another.¹¹ In recent years, however, marketers have suggested that a brand is also a promise to deliver a specific set of features, benefits, services, or experiences to consumers on a consistent basis.¹² For the Olympic brand, the ideals, and values (e.g., excellence, friendship, community) that have been central to the Olympic movement for more than 100 years have created an aura that differentiates the Olympic system from other professional sport systems. This has made the Olympic brand an attractive proposition for a multitude of stakeholders, including broadcasters, sponsors, governments, international federations, and professional sport leagues, seeking to transfer these associations to their own brands. By establishing strategic brand alliances, the IOC has built a system that contributes to its brand equity and to that of its stakeholders. For example, by integrating/aligning the Olympic brand within their activation programs, sponsors provide the Olympic brand with billions of dollars in promotional value and with an array of other benefits (brand recognition, access to markets worldwide, competitive advantage, etc.), which in the end greatly contribute to brand equity. On the other hand, the values associated with the Olympic brand provide the kinds of extensions that sponsors look for in the property. In addition, being connected to 205 NOCs provides TOP partners with multiple opportunities to activate at the national level. This is possible because of the "rich imagery" and the "compelling stories" associated with the Olympic brand.

While these brand alliances bring great value to the Olympic brand, it is paramount that a brand governance structure that manages and controls the brand and its many assets be established. Otherwise, the issue of clutter and ambush marketing may dilute the brand. Here, clutter refers to the amount of competing communications messages vying for the attention of fans, spectators, and potential consumers.¹³

11 Aaker, above note 9 at 7.

12 Philip Kotler & Kevin Keller, *Marketing Management* (Upper Saddle River, NJ: Pearson Prentice Hall, 2005) at 274.

13 Séguin & O'Reilly, above note 6 at 64.

Clutter and ambush marketing are closely related; previous research suggests that a cluttered environment coupled with the presence of ambush marketing enable non-sponsors “to navigate the cluttered marketplace through association with the Olympic brand, which threatens to dilute its promotional effectiveness and decrease its value,”¹⁴ and impact consumers’ ability to distinguish between official and unofficial sponsors which can influence their purchase decisions.¹⁵ Hence, it is believed that sponsor activation programs have become an essential strategy for sponsors in their quest to break through the clutter, engage consumers with their brands, enhance brand reputation, and have positive return on their investments.¹⁶ Since the IOC’s TOP partners clearly believe that clutter and ambush marketing pose a threat to the value of their sponsorships¹⁷ generated by the Olympic brand, the IOC expanded its marketing role “beyond just revenue raising into disciplined brand management of the world’s most powerful brand.”¹⁸ Regardless, an important aspect of brand protection is the ability of the rights holder to protect the brand from a variety of potential threats.

2) Brand Protection

The emergence of brand protection practices beyond straightforward Olympic marks and emblem protection results from the IOC’s decision to manage its brand strategically. For the IOC, protecting and controlling the Olympic brand is of utmost importance. Essentially, it consists of protecting both the tangible (words, symbols, the Olympic motto, etc.) and intangible aspects (image, values, reputation, etc.) of the brand. The protection of tangible aspects of the brand is evident as *words, phrases, and marks* are protected through trademark laws as well as numerous requirements expected

14 *Ibid* at 66.

15 Benoit Séguin et al, “Internationalising Ambush Marketing: A Comparative Study” (2005) 6:4 *International Journal of Sports Marketing & Sponsorship* 216 at 221 and 227.

16 Séguin & O’Reilly, above note 6; Stefan Wally & Amy Hurley, “The Torch Stops Here: Olympic Sponsorship and Corporate Reputation” (1998) 1:4 *Corporate Reputation Review* 343 at 353.

17 Benoit Séguin, André Richelieu, & Norm O’Reilly, “Leveraging the Olympic Brand Through the Reconciliation of Corporate and Consumers’ Brand Perceptions” (2008) 3:1/2 *International Journal of Sport Management & Marketing* 3 at 11.

18 *International Olympic Committee, Olympic Marks, and Imagery Usage Handbook* (Lausanne: International Olympic Committee, 1999) at 7, as cited in Séguin & O’Reilly, above note 6 at 65; see also Alain Ferrand, Jean-Loup Chappelet, & Benoit Séguin, *Olympic Marketing* (New York: Routledge, 2012) at 57.

of host and bid cities in this area. However, protecting the intangible characteristics of a brand is much more complicated. To this end, an organization such as the IOC needs to be aware of the actions of not only its own members/employees (including volunteers) but also all those associated with the Movement (athletes, officials, NOCs, OCOGs, sponsors, etc.) as they may impact the integrity and potentially the image and value of the brand. This was the case in 1999 when several IOC members were found guilty of accepting bribes in exchange for their votes for Salt Lake City as the 2002 host city. The media scrutiny that followed brought an unprecedented level of negative publicity worldwide upon the IOC and its members. Some sponsors, publicly and privately, relayed their serious concerns about the impact the scandal was having on the brand image of the Movement, some even going so far as to threaten to withdraw their support. The reaction of the public, media, and most importantly sponsors acted as a “wake-up call” for the IOC in recognizing that a vital part of protecting its brand was the regulation of its own conduct and public image.

The protection against ambush marketing is now synonymous with protecting the Olympic brand. In fact, protecting the brand against ambush marketing is an increasingly sophisticated undertaking. In the next section we examine the issue of ambush marketing, and the efforts to manage it including the use of legislation as the “ultimate weapon” to protect the brand.

3) Managing Ambush Marketing

The literature on ambush marketing proposes numerous strategies for organizers to manage their brand so as to prevent ambush marketing. The first is addressing the clutter that surrounds the environment of sporting events, particularly in respect to major events like the Olympic Games. The relationship between high levels of consumer confusion and a cluttered sponsorship environment is well documented in the literature..

A second strategy consists of strategic activation programs by sponsors. Here, activation refers to “collateral communication of a brand’s relationship with a property.”¹⁹ In other words, it means that additional investments (cash and/or in-kind) are made to ensure that sponsors take advantage of the numerous intangible brand associations that are linked to the property (i.e.,

19 Dimitra Papadimitriou & Artemisia Apostolopoulou, “Olympic Sponsorship Activation and the Creation of Competitive Advantage” (2009) 15:1-2 *Journal of Promotion Management* 90 at 96.

Olympic Games). Common activation techniques used by sponsors include advertising, sales promotions, and hospitality. The level of investment by sponsors can be as much as five dollars on activation for one dollar spent on acquiring the rights of sponsorship.²⁰ However, it is believed that activation creates a connection in the consumer's mind between the property and the sponsor thus making it more difficult for ambushers to create confusion in consumers' minds.²¹ The management and control of broadcast rights is another important aspect of managing ambush marketing opportunities,²² as are public relations (PR). Essentially, PR serves two important purposes. First, it allows for the opportunity to educate consumers about the sponsorship.²³ Second, it provides an outlet for property rights holders to make a public example of the ambusher in hopes of offsetting the benefits they have received via the ambush, with bad publicity.²⁴ This strategy was used by VANOC on numerous occasions prior to the 2010 Olympic Winter Games in Canada. In the Esso example given earlier in this chapter, VANOC quickly engaged key stakeholders (e.g., Olympic gold medallists, media partners, and government) to condemn the promotion. Essentially, a press conference was organized at a hotel located next to Imperial Oil's headquarter and the company was depicted as using unethical/unfair means that were equivalent to cheating for athletes to deceive the public. In fact, the athletes' spokesperson, a high profile Olympic gold medallist, suggested that the company was essentially stealing since it jeopardized future funding for athletes. The CEO of VANOC was reported as saying: "How can we credibly appeal to Canadian companies to support our games and our athletes if their competitors can accidentally or deliberately undermine those

20 *Ibid.*

21 Dean Crow & Janet Hoek, "Ambush Marketing: A Critical Review and Some Practical Advice" (2003) 14:1 *Marketing Bulletin* 1 at 11; Meenaghan, above note 3; Francis Farrelly, Pascale Quester, & Stephen A Greyser, "Defending the Co-Branding Benefits of Sponsorship B2B Partnerships: The Case of Ambush Marketing" (2005) 45:3 *Journal of Advertising Research* 339 at 345 and 347.

22 Crow & Hoek, *ibid* at 10; see also, Meenaghan, above note 3; Stephen Townley, Dan Harrington, & Nicholas Couchman, "The Legal and Practical Prevention of Ambush Marketing in Sport" (1998) 15:4 *Psychology & Marketing* 333; Séguin & O'Reilly, above note 6.

23 Crow & Hoek, above note 21 at 14; Séguin & O'Reilly, above note 6 at 75 and 79.

24 Steve McKelvey & John Grady, "Sponsorship Program Protection Strategies for Special Sport Events: Are Event Organizers Outmaneuvering Ambush Marketers?" (2008) 22:5 *Journal of Sport Management* 550 at 560 and 581; Meenaghan, above note 3 at 110.

investments?"²⁵ He also implied that governments (and hence, taxpayers) would be left to pay any deficit related to the Vancouver Games if sponsors became unwilling to invest.²⁶ In the end, Esso dropped this specific promotion. Further, it did not engage in any other significant ambush campaign prior to or during the Games in Vancouver.

Along the same line as public relations, education programs targeted at specific stakeholders offer a further strategy for managing ambush marketing. The evolution and expansion of anti-ambush marketing education programs by organizing committees reflect such an approach. In the lead-up to the 2010 Vancouver Winter Olympic Games, VANOC viewed education as the number one tool in fighting and preventing ambush marketing, even with anti-ambush legislation as part of their arsenal. The use of educational campaigns is also a way for the rights holder (i.e., VANOC) to explain the value of sponsors and their role in supporting the event hence differentiating them from potential ambushers. As such, VANOC worked closely with its sponsors to ensure an in-depth understanding of the rights purchased, how best to use those rights, the ability of VANOC to protect those rights, and the challenges to be expected in this regard. The task of educating other stakeholders, including consumers, potential ambushers, sport organizations, athletes, employees, and volunteers, was more complex. VANOC developed a broad communication strategy that included publicizing a brochure, direct mail campaigns, presentations at conferences (public, private, academic, etc.), one-on-one meetings with business/sport leaders, and a website which sought to outline exactly what would be considered ambush marketing in the eyes of the organizing committee.

VANOC also used education as an opportunity to clarify *who can tell what story*. From a marketing/communication perspective this was viewed as essential because the Olympics represent the potential to influence consumers and, therefore, can be a vehicle to deliver marketing value. Strategic leveraging of *stories* can create strong emotional connection with target audiences and create great value for one's brand. It is this value that property owners such as the IOC/OCOG strive adamantly to enhance and protect. While the subject of the Olympic Games and the right of associ-

25 Heenan Blaikie, "Let the Games Begin? Under Pressure, Esso Replaces its Olympic Trip Prize" (February 2006) *Canadian Marketing and Advertising Law Update*, online: www.heenanblaikie.com/fr/publications/item?id=901.

26 *Ibid.*

ation is a complicated one,²⁷ tapping into Olympic stories and/or IP without having paid for the right to do so is labelled “ambush marketing” by those negatively impacted (e.g., Olympic sponsors) and “savvy marketing” by those benefitting (e.g., non-sponsors). The challenge lies when primary stakeholders (e.g., NOCs, International Federations (IFs), National Sports Organizations (NSOs), athletes, events) claim ownership over stories that may be linked, directly or indirectly, to the Olympics. Given the increased attention brought by the Games, there is growing pressure from various groups to leverage their stories with their own stakeholders — e.g., NSOs and sponsors, athletes and sponsors, and event owners and sponsors. For example, Canada’s fast casual restaurant Tim Hortons (also known for its coffee and doughnuts) hired Sidney Crosby to promote their product and be a spokesperson for its youth hockey program, the Timbits Hockey Program, of which he was a member in the early 1990s. In its television commercial that was played in the lead-up to the Vancouver Games, Tim Hortons used footage of a young Sidney Crosby in his Timbits uniform asking his father if he can stay on the ice for a couple of minutes. It fittingly ends with today’s Sidney Crosby playing with children and again asking to stay on the ice a little longer. The “story” is one that makes use of Canada’s game (hockey) and one of its most popular players to emotionally connect with consumers while appealing to nationalism and patriotic feelings prior to and during the Games. While not planned, Crosby’s overtime goal that gave Canada the gold medal in hockey made Tim Hortons’s “story” even more powerful. In this example the commercial rights of various stakeholders were at play — athletes (Crosby), NSOs (Hockey Canada) and Olympic rights (IOC/VANOC). While non-sponsor Tim Hortons may have been successful at connecting with all three, it is for such situations that OCOG’s role of clarifying *who can tell what story* is now considered essential from a commercial rights management perspective.

Notwithstanding all the aforementioned strategies, many large sport properties including the IOC expect host country governments to enact special legislation aimed at protecting sponsors from ambush marketing. In fact, cities bidding to host the Olympic Games must provide

27 See, for example, Teresa Scassa, “Ambush Marketing and the Right of Association: Clamping Down on References to that Big Event with All the Athletes in a Couple of Years” (2011) 25:4 *Journal of Sport Management* 354.

[g]uarantee(s) confirming that the legislation necessary to effectively reduce and sanction ambush marketing and, during the period beginning two weeks before the Opening Ceremony to the Closing Ceremony of the Olympic Games eliminate street vending and control advertising space and air space will be passed as soon as possible²⁸

For the 2010 Olympic Winter Games, the Canadian Government provided such guarantees and enacted the *Olympic and Paralympic Marks Act (OPMA)*²⁹ in 2007. The OPMA was designed to enhance the protection provided by existing legislation such as the *Trade-marks Act*³⁰ that already protected Olympic words, symbols, and slogans. In addition, the OPMA included protection against ambush marketing. In terms of enforcement, the OPMA offered the organizing committee a more expedient process. This is believed to be essential by event organizers as major sport events take place over a limited period of time and ambush marketers seek to take advantage of this opportunity.

4) Ambush Marketing and Legislation

The IOC's insistence upon ambush marketing legislation as a condition of a successful Olympic bid has contributed to the expansion of such laws outside of the Olympic context. Other major sporting event sponsors now look for legislative protection against ambush marketing. In 2007 the New Zealand government enacted the *Major Events Management Act*,³¹ which provides comprehensive protection against ambush marketing. It will apply to any event designated by the government as a "major event." In this way, the legislation can be made a part of any bid for a major international sporting event. There is no reason to expect that ambush marketing legislation will not become more widespread. Such legislation was in place for the 2010 FIFA World Cup in South Africa,³² and there are indications that Canada will

28 IOC, *2016 Candidature Procedure and Questionnaire: Games of the XXXI Olympiad* (Lausanne: International Olympic Committee, 2008) at 124.

29 SC 2007, c 25.

30 RSC 1985, c T-13.

31 *Major Events Management Act 2007* (NZ), 2007/35.

32 B34-2001, *Trade Practices Amendment Bill* (S Afr) 2005, s 1, amending the *Trade Practices Act, 1976*; *Merchandise Marks Amendment Act*, (S Afr), No 61 of 2002; *Second FIFA World Cup South Africa Special Measures Act*, (S Afr), No 12 of 2006.

extend the protection of the OPMA to the Pan Am Games to be held in Toronto in 2015.³³

As demonstrated above, anti-ambush legislation has become a part of an evolving strategy to protect the Olympic brand. Yet it is important to note that there is no clear evidence that sponsors see concrete benefits from the enactment of such legislation. In fact, for a majority of domestic sponsors interviewed after the 2010 Olympic Winter Games, the inherent nature of ambush marketing, which is all about “grey areas and fine lines,” makes it nearly impossible to stop ambushers even with legislation.³⁴ In cases where “offenders” were identified, the retributions consisted of a “slap on the hand.” One sponsor even suggested that to be truly effective, the laws would have to be much more rigid and offenders punished harshly. But given the Canadian marketplace and the environment within which sponsors operate, some reported that such an aggressive stance on ambush marketing could actually work against an organizing committee, provoking a public backlash, and ultimately damaging the Olympic brand: “whoever takes the heavy hand is going down in the marketplace for sure, the media will be all over them.”³⁵ This was the case in the lead up to the London 2012 Olympic Games where organizers used the *London Olympic Games and Paralympic Games Act*³⁶ to stop individuals and small businesses from engaging with the Games. For example, the Fantastic Sausage Factory in Weymouth was reportedly told to take down a sign showing five sausage rings in the shape of the Olympic logo, with 2012 written underneath. The logo was changed to squares and the 2012 for 2013. Others that were caught up included a “florist that put up Olympic rings made of tissue paper and an 81 year-old woman hoping to sell a £1 doll-wearing a hand-knitted sports kit with a GB 2012 logo and Olympic rings in a fund raising sale.”³⁷

The overall retrospective feeling noted by sponsors was that the legislation was probably not needed and should not necessarily be a priority for

33 Toronto 2015 Pan American and Parapan American Games, *Your Moment Is There* (Toronto: 2009) at 189, online: Pan Am Toronto 2015 www.toronto2015.org/assets/files/pdf/Toronto-2015-Bid-Book-EN.pdf.

34 Benoit Séguin, Norm O'Reilly, & Dana Ellis, *Olympic Sponsorship and Ambush Marketing: Summary of Interviews with Grand National Sponsors of the 2010 Vancouver Olympic Winter Games*. (Report presented to the Canadian Olympic Committee, Toronto, 2011.)

35 *Ibid* at 19.

36 *London Olympic Games and Paralympic Games Act 2006* (UK), c 12 [*London Act*].

37 Vanessa Barford, “London 2012: The Great Olympics Sponsorship Bandwagon” *BBC News Magazine* (13 July 2012), online: BBC News www.bbc.co.uk/news/magazine-18182541.

the future. While domestic sponsors (i.e., Grand National Sponsors) for the 2010 Olympic Games claimed unprecedented successes with their sponsorship programs, this was not necessarily proof that the OPMA was effective; as suggested earlier, a well-executed and integrated brand management strategy by event organizers in conjunction with their partners and sponsors is much more likely to be at the root of any such success.³⁸ Post 2010 Games interviews conducted with the six Grand National Sponsors indicated that the level of sponsorship integration within their businesses was unprecedented. It was found that each sponsor appointed either senior level executives or high-level managers specifically responsible for Olympic affairs. Corporate “Olympic teams” were put in place for coordinating efforts and supporting the main strategic objectives of each sponsor. While the level and sophistication of integration varied from sponsor to sponsor, integration occurred both horizontally across departments/business units and vertically from headquarter to store level. Integration was completed by ensuring that all departments (or business units) were involved in creating objectives and activation strategies for their respective units. For one sponsor, having the CEO as the chair of the “project team” (i.e., corporate Olympic team) ensured complete alignment and was identified as critical to ensure a thorough understanding of what had to be done to integrate the various “banners” of the corporation.³⁹ In the end, it was believed that activation of sponsorships provided meaningful brand experiences for consumers, employees, and businesses.

Given that there is little evidence that ambush marketing laws contribute in a meaningful way to the success of sponsorship programs, their potential negative impacts deserve consideration. These negative impacts have their root in the very nature of the rights that are created by this legislation and their scope.

Ambush marketing legislation essentially creates a new form of intellectual property right. This right is in the event itself, and it is typically vested with the event organizers. In the case of the OPMA, for example, the right could be exercised by VANOC or, outside the designated period, by the Canadian Olympic Committee (COC).⁴⁰ The right protects against unauthorized associations with the event. Thus, a property right is recognized in the

38 See, for example, Séguin & O'Reilly, above note 6; Séguin, Richelieu, & O'Reilly, above note 17.

39 Séguin, O'Reilly, & Ellis, above note 34 at 11.

40 See above note 29, s 5(2).

goodwill generated by the event; only the event organizers may authorize others to associate themselves with this goodwill.

The right of association protects something different from what is protected by trademark law or the law of passing off. Trademark infringement or passing off arises where a party has attempted to create customer confusion as to the identity of the trade source of particular wares or services. This is done through the use of marks or other indicia that are confusing with those of a trademark owner. There is an overt use or manipulation of the owner's trademarks. By contrast, the right of association is violated when someone creates, in the minds of consumers, an association between their business, wares, or services and the protected event.⁴¹ There is no need to use the trademarks of the event organizers; the association can be created by oblique reference to the event itself, including references to the host city, the time of year, or the general nature of the activities featured at the event.⁴² In addition, it is not consumer *confusion* that is the target, but rather the connection that may be triggered in the consumer's mind. In other words, the consumer does not have to be misled in any way; infringement occurs where consumers think, however fleetingly, of the Olympics at the same time as they are viewing the advertising content of the offending business. It is not even necessary that the consumer be misled into thinking that there is an actual commercial association (i.e., a sponsorship relationship) between the ambusher and the event.

5) Negative Impacts of Anti-Ambush Legislation

At the heart of the difficulties posed by ambush marketing legislation and the new right of association is the broad, elusive, and ultimately subjective nature of an "association." The right of association gives event organizers the ability to control commercial associations with the event. Anyone who creates an unauthorized association is liable to civil sanctions, fines, or even imprisonment depending upon the particular statute and the enacting jurisdiction. Yet, thought works by associations. Conferring the right to authorize such associations on event organizers intrudes dangerously into how we think and experience the world around us. Although most statutes

41 See, for example, *ibid*, s 4; *London Act*, above note 36, s 1.

42 See, for example, Scassa, above note 27 at 356–58; Dana Ellis, Teresa Scassa, & Benoit Séguin, "Framing Ambush Marketing as Legal Issue: An Olympic Perspective" (2011) 14:3 *Sport Management Review* 297 at 300.

will provide a list of ordinary words that are considered suspect in the creation of associations,⁴³ these are not closed lists, and other words, images, juxtapositions, and even physical presence within certain zones or venues can give rise to an offending association.

Another problem with ambush marketing legislation is its scope. Ambush marketing is by nature opportunistic, and in order to anticipate and capture all possible future manifestations of this practice, legislators have sought to frame the right of association in the broadest possible terms. For example, in the debates leading up to the enactment of the *London Olympic Games and Paralympic Games Act*,⁴⁴ the UK Minister for Sport expressly admitted that the “right of association” created to counter ambush marketing was drafted in the broadest possible terms in part because there was no consensus as to what type of conduct it was meant to catch, as ambush marketing was a very fluid concept, and in part because the IOC might make future demands on the Organizing Committee to respond to certain types of conduct.⁴⁵ Not only is the right often framed in an open-ended manner, the mechanics of the law give it additional breadth. Thus, for example, in the *London Act*, both the advertiser and the person who consents to or provides the space for the advertisement are liable; the regulations passed pursuant to the legislation make it clear that human and animal bodies are included as prohibited vehicles for ambush marketing content.⁴⁶

There has already been extensive criticism of the over-expansion of intellectual property rights generally.⁴⁷ Much of this critique has been focused

43 For example, the *OPMA*, above note 29, contained a list of suspect words and expressions in Schedule III (now repealed). These included: Games, 2010, Tenth, 21st, Medals, Winter, Gold, Silver, Bronze, Vancouver, and Whistler. The *London Act*, above note 36, also contains a list of suspect words in section 3 of Schedule 4. In the case of the *London Act*, evidence of an illegal “association” may arise where a combination of words from the first group are used (games, “two thousand and twelve,” 2012, “twenty twelve”) or where a word from the first group is used in conjunction with a word or words from the second group (gold, silver, bronze, London, medals, sponsor, and summer).

44 *Ibid.*

45 UK, HC “Standing Committee” col 79 (19 October 2005).

46 See UK, *The London Olympic Games and Paralympic Games (Advertising and Trading) (England) Regulations 2011*, SI 2011/2898 at Part 2, Regulation 5(1).

47 See, for example, Rochelle Cooper Dreyfuss, Diane Leenheer Zimmerman, & Harry First, eds, *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge* (Oxford: Oxford University Press, 2001); Viva R Moffatt, “Mutant Copyrights and Backdoor Patents: The Problem of Overlapping Intellectual Property Protection” (2004) 19:4 *Berkeley Tech LJ* 1473; Peter Drahos & John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy* (New York: The New Press, 2003); Michael Heller, *The Grid-*

on situations where existing rights have been amplified or extended, but it is also manifested in the creation of new rights.⁴⁸ The creation of intellectual property-type rights in major events is part of this trend, and the degree to which the “right of association” has already spread is a matter for concern.⁴⁹ Indeed, the right of association seems to expand in breadth and scope with each legislative iteration. Critics of expanding intellectual property rights raise concerns about a shrinking public domain, and about the associated impact on creativity, human expression, and innovation.⁵⁰ The right of association, as will be discussed further below, has similar effects, even though it operates within a marketing context. Most significant, perhaps, is its impact on human expression in commercial and para-commercial contexts. Not only does such legislation have the potential to stifle a community’s ability to engage with an event that is taking place in its midst, it may also create serious constraints for athletes and the amateur sporting organizations that support them, creating additional barriers to participation in competitive sports. As noted earlier, the legislation augments a brand protection strategy that seeks to control what “stories” can be told about the event and by whom. The multiplicity of stakeholders in Olympic events gives rise to multiple stories. The legislation thus privileges some stories and excludes others.

The scope and breadth of ambush marketing legislation raises freedom of expression issues. While most such laws are drafted so as to apply only to commercial associations, it is not always easy in an age of rampant consumer capitalism to distinguish between individual and commercial expression. For example, individuals are encouraged to embrace brands as an

lock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation and Costs Lives (New York: Basic Books, 2008).

- 48 The *sui generis* database right that was created in Europe in 1995 to give new rights in compilations of data is one example.
- 49 As noted earlier, New Zealand has enacted general ambush marketing legislation which can be invoked for any event designated as a major event. South Africa also enacted ambush marketing laws for the FIFA World Cup of Soccer.
- 50 See, for example, Jessica Litman, “The Public Domain” (1990) 39:4 *Emory LJ* 965; Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (New York: Vintage Books, 2002); Jennifer Davis, “Protecting the Common: Delineating a Public Domain in Trade Mark Law” in Graeme B Dinwoodie & Mark D Janis, eds, *Trademark Law and Theory: A Handbook of Contemporary Research* (Cheltenham UK: Edward Elgar, 2008) 345; Lewis Hyde, *Common as Air: Revolution, Art, and Ownership* (New York: Farrar, Strauss & Giroux, 2010); James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven, CT: Yale University Press, 2008); Eva Hemmungs Wirtén, *Terms of Use: Negotiating the Jungle of the Intellectual Commons* (Toronto: University of Toronto Press, 2008).

extension or articulation of their identities, and the wearing or carrying of sometimes ostentatiously branded items is part of this trend.⁵¹ Charities use trademarks and cross-license them for use by private sector companies.⁵² The distinction between commercial expression and personal or non-commercial expression is frequently blurred.

In the small business context, it has long been commonplace for local businesses to sell their wares in a manner that reflects events taking place within the community. Bars and restaurants may display the logos of local sports teams that are competing in playoffs, bakeries may ice cakes or cookies for window displays that reference local events,⁵³ restaurants have entered the spirit of elections by allowing patrons to “vote” based on the meal they have ordered; the examples are nearly endless. There may be a marketing angle to businesses who engage with such events; but there is a human and communicative dimension as well. At the heart of it is the right of businesses to make reference to events that take place within the public sphere. Legislation that prevents a local business from referencing a massive, international event that happens to be taking place a few blocks away restricts a form of expression that is not simply commercial but that also relates to the role that businesses — particularly small, local businesses — play within a community. Certainly, in the case of the London Games, the broadly worded right of association combined with zealous enforcement led to public concern over the extreme manner in which local businesses were treated. Media reports indicate that local bakeries, butcher shops, pub owners, caterers, and even grandmothers who knit doll clothes for church charities were all targeted by officials for the associations they created between their wares or services and the Games.⁵⁴ Public resistance

51 See, for example, Naomi Klein, *No Logo: Taking Aim at the Brand Bullies*, 10th anniversary ed (Toronto: Vintage Canada, 2010) at ch 3; Lucas Conley, *OBD: Obsessive Branding Disorder: The Illusion of Business and the Business of Illusion* (New York: Public Affairs, 2008) at ch 3.

52 An example of this is the association of the colour pink with breast cancer charities and the cross-licensing of related “pink” trademarks. For a critical examination, see Ann Bartow, “Trademarks, Commoditization, Gender and the Color Pink” (2008), online: www.chicagoip.com/pinkdraft.pdf.

53 It was reported that LOCOG had to be called off its zealous attempts to stop bakeries and other small businesses in London from joining in the spirit of the Games in this manner.

54 See, for example, Matthew Fisher, “Olympic Brand Enforcers Out in Full Force for London Games” *The Ottawa Citizen* (24 July 2012) A8; Christopher Hope, “Have Your Olympic Cakes, Display Them, Too; Minister Tells Logo Police To Go Easy on Small British Shop Owners” *The Ottawa Citizen* (19 July 2012) C6.

to this level of restriction led the UK's Minister responsible for the Olympics to request that officials ease up on their actions against small business operators.⁵⁵

Many of the stories that can be told about an event and the athletes who participate in it have commercial dimensions. An athlete and/or a national sport organization (i.e., Speed Skating Canada) may have sponsors who support high performance programs in the long lead up to a major event like the Olympics. When the athlete succeeds in securing a spot on the national team, when they compete in the event, and when they earn medals, the sponsor will expect a return on their investment in the athlete by linking their name and logos with the athlete and/or sport. Yet, unless this sponsor is also an Olympic sponsor, associating themselves with the event through the athlete will contravene ambush marketing laws by creating an unauthorized association. This can pose a significant challenge for athletes, teams, amateur sporting organizations, and their sponsors. High profile incidents reveal how challenging these issues may be, and how athletes themselves may be placed in situations where they are publicly censured or even fined.⁵⁶ Thus, by making anti-ambush laws a condition for a successful bid to host a major event, the sporting organizations influence governments to enact laws that may infringe on the rights of the public on the one hand⁵⁷ and create another form of ambush towards NSOs and athletes on the other.⁵⁸ For example, Olympic sponsors are offered certain rights to affiliate themselves with athletes and teams during the Games, which may interfere with NSO in-house marketing programs. Such activities may damage long-term sponsorship efforts of NSOs and potentially hurt their ability to gener-

55 Hope, *ibid.*

56 For example, during the EURO 2012 football tournament, a player was penalized for lifting his shirt to the cameras to show the waistband of his underwear which bore the logo of a company that was not a UEFA sponsor. See Telegraph Sport, "EURO 2012: Nicklas Bendtner's £80,000 Fine For Sponsored Underwear Exposes Uefa's Skewed Priorities," *The Telegraph* (18 June 2012), online: The Telegraph www.telegraph.co.uk/sport/football/competitions/euro-2012/9339202/Nicklas-Bendtners-80000-fine-for-sponsored-underwear-exposes-Uefas-skewed-priorities.html. In another example, Jamaican Sprinter Usain Bolt faced criticism when he removed his gold Puma shoes during his victory lap after winning the men's 100-metre sprint at the Beijing Olympics. He kissed his shoes and held them up to the camera. Puma was not an Olympic sponsor. See: Marina Palomba, "Is Ambush Marketing Dead?" *Reacts* (May 2010), online: www.advertisingcompliancelaw.com/uploads/file/10-097%20ReACTS%20-%20Is%20ambush%20marketing%20dead.PDF.

57 Ellis, Scassa, & Séguin, above note 42 at 303–4.

58 Ellis, Gauthier, & Séguin, above note 1 at 263.

ate sponsorship revenue.⁵⁹ In addition, important stakeholders, NSOs, and athletes are not consulted when governments decide to enact legislation, giving the process a lack of transparency. Future research should examine the impacts of legislation on other stakeholders and re-examine its use as part of a brand management/protection strategy.

D. CONCLUSION

This chapter examined the need for major events to protect/control their brands against activities such as ambush marketing. Though this paper focused mainly on the Olympic Games, the principles presented herein could be applied to other major events such as the FIFA World Cup, ICC Cricket World Cup, Commonwealth Games, and the like. While it has been common practice to develop contingency plans based on potential risks (security, financial trouble, boycotts, etc.) associated with sporting events, the approach to brand protection is rather novel.

The strategic brand management approach adopted by the IOC towards the end of the 1990s transformed the organization and its relationship with its stakeholders.⁶⁰ The careful management of the brand by the IOC has made the five interlaced rings one of the most powerful brands in international sport. Its strong brand equity makes the Olympic brand an attractive proposition for a multitude of stakeholders wishing to benefit from an association with the brand. As a result, the Winter and Summer Olympic Games are among the most appealing sporting events in the world, reaching billion of viewers through television. In addition, the development of a sophisticated marketing program has helped the IOC and its main stakeholders, namely OCOGs and NOCs, raise billions of dollars in revenue. Hence, protecting and controlling the Olympic brand and its high level of equity is of the utmost importance for the IOC and its stakeholders.

The issue of ambush marketing and its possible threat to brand equity has been identified as a key concern for sport organizations and their partners. Many strategies are used by event owners (e.g., IOC/OCOGs) and their partners to manage their brands and to counter ambush marketing. Nevertheless, international sport federations have sought to leverage the enor-

⁵⁹ *Ibid.*

⁶⁰ Séguin, Richelieu, & O'Reilly, above note 17 at 4.

mous interest from cities/countries for hosting major events and to make anti-ambush marketing legislation a requirement for hosting these events.

While major sponsors applaud such added protection, there are potentially a number of negative impacts that deserve consideration when discussing ambush marketing legislation. For example, such legislation creates a new form of intellectual property right referred to in this chapter as the right of association. Given the subjective nature of an “association” and given the multiplicity of stakeholders for any major event, each with their own interests, awarding such rights to event organizers creates a dangerous precedent. The scope and breadth of ambush marketing legislation raises serious issues including freedom of expression. Ambush legislation is framed in the broadest possible terms as a way to encompass all forms—current and new—of associations. There are indications that it can and has been used to prevent small businesses from engaging with major international events that take place within their community. Further, the impact of legislation on athletes and sport organizations has yet to be fully understood. Preventing athletes and sport organizations from sharing compelling stories with the public may impact their ability to raise the necessary funds to finance their training programs through corporate sponsorship. Early research on the subject suggests that the need to protect the interests of sponsors through anti-ambush legislation may actually be creating problems for other sponsors.⁶¹ In a system where value is being co-created by all stakeholders,⁶² such actions could be problematic in the future. Since application of anti-ambush marketing legislation rests in large part with organizing committees, the way in which they manage this sensitive issue in the future will dictate whether legislation is the ultimate form of brand protection. The negative media coverage that resulted from FIFA’s efforts during the 2010 World Cup, as well as the efforts of LOCOG during the London Games, may point instead to the need to use softer strategies such as education. The strategy adopted by Vancouver 2010 was an aggressive education program targeted at each stakeholder with legislation being used as a deterrent. Future research in this area should examine the impacts of legislation on all stakeholders and define the most advantageous aspects of legislation for each group of stakeholders as their requirements for, and concerns about, such measures may be different.

61 Ellis, Scassa, & Séguin, above note 42.

62 Ferrand, Chappelet, & Séguin, above note 18.